89-757 (1)

SUPREME COURT, U.S.
FILED
NOV 7 1989
JOSEPH F. SPANIOL, JR.

No.

IN THE

Supreme Court Of The United States

October Term, 1989

JOANNE C. NEWAK,

Petitioner,

vs.

UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

FAITH A. SEIDENBERG
Seidenberg, Strunk and Goldenberg
246 East Water Street
Syracuse, New York 13202
(315) 422-0144
Counsel of Record

November 7, 1989

Appellate Productions, Inc.
Syracuse, New York

20 pp

QUESTION PRESENTED

Whether an appellate court which found prejudicial error, based upon conflict of interest in a single criminal matter where a defense attorney represented both Petitioner and a government witness against Petitioner, could hold such error fatal to some charges but harmless to others.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
OPINIONS BELOW	1-2
JURISDICTION	3
CONSTITUTIONAL PROVISIONS INVOLVED	4
STATEMENT OF THE CASE	5-13
REASONS FOR GRANTING THE WRIT	14
I. A FINDING OF HARMLESS-ERROR WHERE CRIMINAL DEFENSE COUNSELS' DUAL REPRESENTATION WAS PREJUDICIAL TO DEFENDANT THROUGHOUT THE PROCEEDING IS A DIRECT CONTRADICTION TO SUPREME COURT'S RULINGS	14-18
II. WHEN THE COURT OF MILITARY APPEALS CONCLUDED THAT DEFENSE COUNSEL'S CONFLICT OF INTEREST RESULTED IN "TAINTED EVIDENCE" IT REDUCED A QUESTION OF FUNDAMENTAL CONSTITUTIONAL RIGHTS TO ONE OF MERE EVIDENTIARY STANDARDS	19-20
CONCLUSION	21
Appendix..... set forth in separate cover	

TABLE OF AUTHORITIES

Cases:

	Page
Chapman v. California, 386 U.S. 18 (1967)	14
Cuyler v. Sullivan, 446 U.S. 335 (1979)	14
Glasser v. United States, 315 U.S. 60 (1942)	15,17
Holloway v. Arkansas, 435 U.S. 475 (1977)	14, 15
Kastigar v. United States, 406 U.S. 441 (1971)	19
United States v. Newak, 15 M.J. 541 (1982)	2, 10
United States v. Newak, 24 M.J. 238 (1987)	9, 10, 11, 14, 16, 17, 20

Constitutional Provisions:

United States Constitution Amendment V	4, 14, 19
United States Constitution Amendment VI	4, 14, 20

Statutory Provisions:

10 USC Section 817	3, 5
10 USC Section 867(b)(3)	5
28 USC Section 1259 (1)	3

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

JOANNE C. NEWAK, Petitioner,

vs.

UNITED STATES, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

The Petitioner, Joanne C. Newak, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Military Appeals entered in the case entitled, United States v. Newak on September 8, 1989.

OPINIONS IN COURTS BELOW

The following opinions have been issued in the Courts below, and are reprinted in the Appendix:

1. United States v. Newak, ACM 23544, decision of General Court-Martial, Military Judge Robert H. Leonard, 11 March 1982, set forth in the Report of Result of Trial, dated 11 March 1982. Unpublished. Reprinted in the Appendix at pages 70 to 72.

2. United States v. Newak, Staff Judge Advocate's Review of Trial by Court Martial, 6 May 1982. Unpublished. Reprinted in the Appendix at pages 75 to 103.

3. United States v. Newak, United States Air Force Court of Military Review, 14 December 1982. Published at 15 M.J. 541 (AFCMR 1982). Reprinted in the Appendix at pages 109 to 115.

4. United States v Newak, United States Air Force, Action of the Judge Advocate General, dated 23 March 1983 (ACM 23544). Unpublished. Reprinted in the Appendix at page 116.

5. United States v. Newak, United States Court of Military Appeals, 13 July 1987. Published at 24 M.J. 238 (CMA 1987). Reprinted in the Appendix at pages 117 to 132.

6. United States v. Newak, United States Air Force Court of Military Review, 16 October 1987. Unpublished. Reprinted in the Appendix at pages 135 to 141.

7. United States v. Newak, United States Air Force Court of Military Review, 6 January 1989. Unpublished. Reprinted in the Appendix at pages 149 to 155.

8. United States v. Newak, United States Court of Military Appeals, 8 September 1989. Unpublished. Reprinted in the Appendix at pages 156 to 157.

JURISDICTION

Jurisdiction in the United States Supreme Court is invoked upon 28 USC Section 1259(1), seeking review of a decision of the Court of Military Appeals dated 08 September 1989, and entered on said date, affirming Petitioner's conviction after court-martial under jurisdiction of 10 USC Section 817 on March 10 and 11, 1981.

This petition for certiorari is filed within 60 days of the decision of the Court.

TEXT OF CONSTITUTIONAL PROVISIONS

Provisions of the United States Constitution

Amendment 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution
Fifth Amendment

Amendment 6

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

United States Constitution
Sixth Amendment

STATEMENT OF THE CASE

Basis of Federal Jurisdiction

The Petitioner was tried before a United States Air Force Court-Martial under jurisdiction of 10 USC Section 817 on March 10 and 11, 1982. The Report of Result of Trial was issued by the judge who sat at the court-martial on March 11, 1982. See Appendix, pages 70 to 72.

The conviction and sentence was appealed to the United States Air Force Court of Military Review, where the conviction and sentence were affirmed on December 14, 1982. See Appendix, pages 109 to 115.

The Court of Military Appeals reviewed the decision under jurisdiction based on 10 USC Section 867(b)(3), and on 13 July 1982 reversed in part, and remanded the case to the Military Court of Review for further consideration. See Appendix, pages 117 to 132. The Court by order dated 19 August 1982 retained jurisdiction. See Appendix, pages 133 to 134. The Court of Military Review affirmed the remaining convictions on 16 October 1987, and ordered a rehearing on sentencing. See Appendix, pages 135 to 141.

The Court of Military Review again affirmed the remaining convictions after resentence on 06 January 1989. See Appendix, pages 149 to 155.

The Court of Military Appeals affirmed the decision of the Court of Military Review on 08 September 1989. See Appendix, page 156 to 157.

Facts of the case

I

On or about June 17, 1981, Airman First Class Donna L. Ryan, who was then stationed at Hancock Field, New York, was arrested on a driving while intoxicated charge. At some point after her arrest, Ryan began to act as an informant for, and provide information to, the Air Force Office

of Special Investigation. As an informant, she reported that Airman John Liles, Lieutenant Joanne Newak and Senior Airman Lynne Peelman, were using controlled substances in the vicinity of Hancock Airfield where they were stationed with the U.S. Air Force. An agent of the Air Force Office of Special Investigation contacted Newak, Peelman and Liles, and advised them of their rights. All three denied the reported activities.

In early September, 1981, Newak, Peelman and Liles sought legal counsel at Griffiss Air Force Base. Area defense counsel Captain John Powers was assigned to all three. He met with Newak and Peelman and established an attorney-client relationship with both. At about the same time, Powers also undertook representation of Liles. Powers became aware of an impending transfer in late August or early September of 1981. Starting in either September or early October, Powers brought Captain John Smith to interviews with Newak, Peelman and Liles as co-counsel. Smith established an attorney-client relationship with each of them and later represented each as sole counsel.

On or about Tuesday October 20, 1981, Smith entered into negotiations with government counsel. These negotiations resulted in testimonial immunity being offered to two of his three clients, Peelman and Liles. At about this time he told Peelman and Liles that "Newak was going down the tubes", and to stay away from her. He specifically urged Peelman to co-operate with the government.

On or about Friday, October 23, 1981, Smith withdrew from the defense of Newak. Smith continued to represent Peelman throughout the proceeding, including the trial of Newak's court-martial, and Newak was assigned other defense counsel. Liles also was given different defense counsel at about this time.

Charges I to IV of the original charge sheet, set forth in the Appendix at pages 1 to 7, alleged various drug related offenses and behavior unbecoming an officer, all of which were based upon accusation made by Ryan, were preferred against Newak on October 23, 1981.

Major Maurice Deaver was assigned as Investigating Officer on these charges, and he conducted an Article 32 hearing on November 6, 1981. At this hearing, Peelman refused to testify upon advice of Smith, and Liles also refused to testify based upon advice of his defense counsel. In his report of the same date, set forth in the Appendix at pages 7 to 22, Deaver concluded there was not enough evidence to proceed to trial on the charges. He specifically recommended steps be taken to secure additional testimony, and, if such testimony could be obtained, the matter then be reopened.

After the completion of the initial Article 32 hearing, Smith finalized negotiations for Peelman's testimonial immunity, thereby assisting in the prosecution of his former client Newak. In December, based upon the information obtained from Peelman, which had been provided to the government throught Smith's encouragement, additional charges based upon a sexual relationship between Newak and Peelman were added to the charges. These charges are set forth in the additional charge sheet, set forth in the Appendix at pages 23 to 28.

On January 6, 1982, a second Article 32 investigation was conducted by Investigating Officer Colonel Lawrence Gingold. With grants of immunity, Peelman and Liles both testified at this hearing, and the Investigating Officer in his report, set forth in the Appendix at pages 32 to 47, recommended that Newak be tried by court-martial.

Newak entered pleas of Not Guilty to all of the charges and their specifications.

On 10 and 11 March 1982, Petitioner was tried by general court-martial with a military judge sitting alone.[1] At the trial, Peelman was the chief prosecution witness against Newak. She was advised by Smith throughout her testimony. Smith was called as a defense witness at the trial, and he admitted that he had represented Newak on the same charges. Peelman was never charged or prosecuted. Liles did not testify at the trial, but his written testimony from

the second Article 32 hearing, obtained under his grant of immunity, was used at the trial. The trial judge at the court-marital found Newak guilty of all of the charges and the specifications referred to trial.[1]

Lt. Newak was sentenced to dismissal, confinement at hard labor for seven years, and forfeiture of all pay and allowances.

During administrative reviews, several charges were dismissed and several were reduced, and her sentence was eventually reduced to three years.[2]

II

In the second Article 32 hearing, when the government used evidence which was derived from Peelman and Liles, who had been represented by Newak's former defense attorney, Petitioner challenged the use of that testimony as violative of her constitutional rights. The Investigating Officer accepted the offered proof, and did not consider the constitutional challenge, stating "he was making no recommendation on this matter which does not directly relate to the form of the charges and specifications and the truth thereof."

As noted above, during the course of the trial Smith was called as a witness for the defense. He testified concerning the matter of immunity:

Q: Did you bring up the subject of immunity?

A: With whom?

Q: With the Base Staff Judge Advocate?

A: Not directly, no. They brought it up to me.

Q: And was there any bargaining on your part, between acting for Airman Peelman vis-a-vis the Base Staff Judge Advocate at Hancock?

A: I don't quite understand.

Q: In other words, did you say - did you go in and say, "If you'll give us immunity, no prosecution of Airman Peelman, Airman Peelman will roll on Lieutenant Newak," or anything like that?

A: No, not directly. It was back and forth. They were trying to figure out who to work out immunity with. I was dealing with my client Airman Peelman! as to whether or not that is what she wanted me to work out for her.

(Emphasis added.)
United States v Newak, 24 M.J. at 240.

In addition, as was noted by the Court of Military Appeals in its decision, Smith acknowledged during the trial, that while representing Peelman, his advice to her to cooperate under the anticipated grant of testimonial immunity may have been affected by confidences entrusted by Newak, as was revealed by this colloquy with the military judge:

Q: Were you ever told by Captain Powers what Lieutenant Newak's version of what the potential offenses was?

A: Yes, sir.

Q: So, Captain Powers did relate to you what Newak, what Lieutenant Newak had told him about these offenses?

A: Yes, sir.

Q: Did you ever reveal this information that Captain Powers told you about Lieutenant Newak's version of the offenses, to Airman Peelman?

A: Not consciously, sir.

Q: What do you mean by not consciously?

A: I never took that information and directly related to Airman Peelman.

Q: Do you feel that you might have unconsciously done so?

A: I feel that information may have impacted on my conversations with Airman Peelman.

Q: In what way?

A: Well, after I was separated from Lieutenant Newak, the possibility of immunity came up for Airman Peelman, and I knew some things about Lieutenant Newak that may have influenced how I recommended

to Airman Peelman that she should go.

United States v Newak, 24 M.J. at 240.

Petitioner's motion at the trial to dismiss all charges based upon the violation of her constitutional right to effective assistance of counsel was denied by the judge.

In her reply to the Staff Judge Advocate's Review of the trial by court-martial, set forth in the Appendix at pages 75 to 103, Petitioner renewed her motion, which was again denied.

Petitioner raised the issue of ineffective assistance of counsel in her appeal to the Air Force Court of Military Review. The court affirmed the conviction and sentence as approved, on December 14, 1982, in United States v. Newak, 15 M.J. 541.

Petitioner raised the issue again on appeal to the Court of Military Appeals. In its decision of 13 July 1987, 24 M.J. 238, the court found that Smith's actions constituted a conflict of interest, which was prejudicial to Newak. The court observed "In short, because Captain Smith was not free to to argue against Peelman's interest, he was not free to represent Newak adequately."
United States v Newak, 24 M.J. at 243.

The court observed that Smith's conduct with respect to the matter of immunuity amounted to abandonment of Newak. United States v Newak, 24 M.J. at 244.
In effect, although Newak though she was being represented by Smith, she was in reality without assistance of counsel during a crucial stage of the proceedings.

The court determined that as a consequence of the conflict of interest,

> "[t]he testimony of Peelman and any evidence or information derived therefrom was tainted and should not have been admitted in evidence at the trial."

United States v Newak, 24 M.J. at 244.

The court found that the findings of guilty that arose from Peelman's testimony could not stand. The court remanded the case to the Judge Advocates office for the Court of Military Review for determination as to whether independent evidence existed upon which those charges could be reprosecuted. In addition, the court noted that the issue of possible "spillover" of the taint from the affected charges to the remaining charges had not been considered by the Court of Military Review, and remanded the case to the court for review.

The court instructed:

> The record of trial is returned to the Judge Advocate General of the Air Force for remand to that court for consideration of the issue of whether the remaining findings of guilty were tainted by the actions of defense counsel. If they were, a rehearing may be ordered on all charges and specifications which were approved by the convening authority. If they were not tainted, a rehearing may be ordered on the specifications and Charges affected by the decision of this Court and the sentence. If a rehearing on findings is deemed impracticable, the affected Charges and specifications may be dismissed. If any specifications remain, a rehearing on sentence may be ordered.

United States v Newak, 24 M.J. at 244.

While the Court of Miltary Appeals addressed at some length Smith's conduct during the course of the pretrial stages of the proceedings, and his improper use of information he derived from his representation of Newak, the court failed to recognize the impact such conduct had on Newak's prosecution. The court noted Smith's conduct impacted on every phase of the case, including the decision to prosecute Newak in a court-martial. The remedy the court fashioned failed to address the actual nature of the harm inflicted on

Newak as a result of her former's counsels conduct. In finding that the error was harmless with respect to the charges on which Peelman did not testify, the court placed

an improper restriction on the right to effective assistance of counsel.

Upon remand to the Court of Military review, Petitioner contended all of the findings of guilty should have been dismissed inasmuch as the actions of her former defense counsel were so pervasive and carried on throughout all of the essential states of the proceedings as to render it impossible to limit the taint to any specific charges. As a consequence, the "spillover" from her military counsel's ineffective representation could not be divided by charges and should have been found by the court to taint the entire proceedings.

On remand, the Court of Military Review reviewed the record without conducting an evidentiary hearing. On 16 October, 1987, the Court issued its decision.
It concluded with respect to alternative untainted evidence concerning the charges on which Peelman has testified, "Our review of the record and the pretrial investigation convinces us that no such evidence exists." (Opinion of the Court of Military Review, 16 October 1987, set forth in the Appendix at pages 135 to 141. In addressing the "spillover" issue, the Court determined that the issue was one of first impression, and decided the issue based upon its analogy to cases involving improper use of an accused's immunized testimony. Based upon this review it concluded that there was an "independent" basis for the remaining charges. The Court dismissed the charges which were based upon Peelman's testimony, affirmed the finding of guilty on the remaining offenses charged, and ordered a rehearing on the sentence.

The sentence was affirmed upon resentencing on 3 May 1988, except for reduction of the confinement to 14 months (the time served). Newak appealed the October 16, 1987 decision of the Court of Military Review and her resentencing to the Court of Military Review. In its decision

of 6 January 1989, that Court again upheld the remaining offenses and the sentence.

On review the Court of Military Appeals affirmed the decision of the Court of Military Review. Lt. Newak now seeks a Writ of Certiorari to the United States Supreme Court.

REASONS FOR GRANTING THE WRIT

I

WHERE A CRIMINAL DEFENSE COUNSELS' DUAL REPRESENTATION WAS HELD TO BE PREJUDICIAL TO DEFENDANT, A FINDING OF HARMLESS ERROR AS TO PART OF THE CHARGES BROUGHT IN A SINGLE PROCEEDING IS A DIRECT CONTRADICTION TO SUPREME COURT'S RULINGS.

The decision of the Court of Military Appeals in this case is in direct contradiction to this Court's holding that joint representation of conflicting interests by a defense attorney can never be harmless error. Holloway v. Arkansas, 435 U.S. 475 (1977); Cuyler v. Sullivan, 446 U.S. 335 (1979). After a trial by court-martial, Petitioner was convicted of all charges. Upon appeal, the Military Court of Appeals held the dual representation of the defendant and a chief prosecution witness constituted a conflict of interest and was reversible error as to some of the convictions but harmless as to others. United States v. Newak, 24 M.J. 238 (1987) The court also ruled that the lower military court could decide whether the convictions which it set aside could be reheard with evidence which might be "untainted" by the conflict. Id. at 244.

This Court's previous cases have established that where an actual conflict of interest prejudices a criminal defendant, there is a breach of the defendant's right to effective assistance of counsel. Such breach is a violation of the Fifth Amendment guarantee of due process which assures there shall be no governmental deprivation of life, liberty or property without due process and the Sixth Amendment guarantee of counsel for criminal defendants.

In Chapman v. California, 386 U.S. 18 (1967) the guarantee of counsel was held to be among those "constitutional rights so basic to a fair trial that their infraction

can never be treated as harmless error." Id. at 23.

When considering the issue of dual representation involving an actual conflict of interest in criminal cases where prejudice to the defendant occurred, this Court has required reversal. Holloway v. Arkansas, 435 U.S. 475 (1977). The Supreme Court ruled that where an error occurs at trial, the effect can be traced,

> [b]ut in a case of joint representation of conflicting interests the evil--it bears repeating--is in what the advocate finds himself compelled to refrain from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process. . . . And to assess the impact of a conflict of interests on the attorney's options, tactics, and decisions in plea negotiations would be virtually impossible. Thus, an inquiry into a claim of harmless error here would require, unlike most cases, [when the error occurs on the trial record] unguided speculation.

Id. at 490-491 (emphasis added.)

Holloway is an interpretation of the seminal dual representation case of Glasser v. United States, 315 U.S. 60 (1972), in which the Court stated, "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." Id. at 76. Yet that is exactly what the military courts have done in the instant case, where certain convictions were set aside, while others were allowed to stand.

Even if this Court is convinced that in cases of multiple convictions at a single trial, prejudice from dual representation which involved actual prejudice could be harmless to some charges, such a rule should not be promulgated and applied in this case. Here, there was actual prejudicial conduct which affected the petitioner from the earliest stages of the proceedings. The Court

of Military Appeals discussed the improper actions of Petitioner's counsel in the pretrial stages of her case, particulary during negotiations with the prosecutor. The Court noted:

> The Government has sought to downplay these exchanges by characterizing the immunity not as a matter of negotiation but rather as a "fait accompli." This contention overlooks the realities of the criminal justice process. We are aware that often the best defense that can be provided for a person accused of a crime is to offer to assist investigators and prosecutors in return for leniency in some form such as dismissal of charges, and reduction or suspension of sentence. The extent of leniency that can be obtained often varies in proportion to the extent of information being provided and the prominence of the person who is the subject of that information.

United States v Newak, 24 M.J. at 242.

The court also made the following observations concerning Smith's conduct:

> In light of the important role of an attorney in advising his client as to cooperation with prosecutors and in negotiating for such benefits as transactional versus testimonial immunity, or a reduced sentence, we cannot gloss over Smith's role as Peelman's legal advisor. If he performed that role in a professional manner, his performance almost inevitably compromised his role as Newak's legal advisor. Conversely, if he acted effectively for Newak, he could not have performed suitably for Peelman.

United States v Newak, 24 M.J. at 242.

The court concluded:

> Unfortunately, Captain Smith's sacrifice of appellant's

> interests did not end with this sin of omission but extended, as well, to subsequent sins of commission. After he had severed his relationship with appellant, he continued to represent Peelman in this matter and actively to advise her and encourage her to act in her own self-interest. Sadly for Smith - and for appellant - it is clear that those interests were not parallel to appellant's; indeed, they ran to a point of inevitable confrontation. Under these circumstances, Captain Smith aided the successful prosecution of his former client just as surely as if he had sat at the trial counsel's table and just as surely, this was improper. See generally Art. 27(a), UCMJ, 10 U.S.C. § 827(a) ("nor may any person who has acted for the defense act later in the same case for the prosecution"); accord United States v. Stubbs, 23 M.J. 188 (C.M.A. 1987).

United States v Newak, 24 M.J. at 242.

In discussing Smith's impediment to pretrial negotiations and plea bargaining on Newak's behalf, the Court of Military Appeals stated, "In short, because Captain Smith was not free to argue against Peelman's interest, he was not free to represent Newak adequately ...." United States v Newak, 24 M.J. at 243.

Clearly, if defense counsel had acted in Newak's best interest during the pre-trial stages of the proceedings, there might not have been any trial. The Supreme Court's decisions since Glasser v. United States in 1942, have held that judgment must be reversed where a criminal defendant has been prejudiced by his counsel's conflict of interest. 315 U.S. 60 (1942). Where actual harm is done to the defendant during the investigation and the trial, the court thereafter should not permit inquiry to determine if

some part of the case was left unaffected. The decision of the Court of Military Appeals directly contradicts this precedent and a writ of certiorari should be granted.

II

WHEN THE COURT OF MILITARY APPEALS CONCLUDED THAT DEFENSE COUNSEL'S CONFLICT OF INTEREST RESULTED IN "TAINTED EVIDENCE" IT REDUCED A QUESTION OF FUNDAMENTAL CONSTITUTIONAL RIGHTS TO ONE OF MERE EVIDENTIARY STANDARDS.

The action of the Court of Military Appeals in considering the constitutional violations described in the argument above as merely an evidentiary issue is a grievous offense against an individual's constitutional rights. To permit courts to treat a violation of such a fundamental constitutional right as the Sixth Amendment guarantee of effective assistance of counsel in such a casual manner, denigrates the importance of this right in our system of justice.

In Kastigar v United States, 406 U.S. 441 (1972), this Court established a standard to assure that the prosecution did not use any evidence acquired from immunized testimony. However, when the constitutional violation results from dual representation involving an actual prejudice from counsels representation of a defendant and a prosecution witness, it is inappropriate to apply Kastigar standards. In Kastigar, this Court was concerned with upholding the Fifth Amendment prohibition of compelled self-incriminatory testimony while still giving reasonable rein to law enforcement personnel. Kastigar requires that one need merely show that he testified under a grant of immunity to shift to the government the heavy burden of proving an independent source for all evidence. 461 U.S. at 461. But in a case where confidential information, gleaned through a former defense counsel's advice to a government witness testifying with immunity is used against the defendant, the resulting prejudice to the

defendant is too pervasive to permit such a cure.

Although Newak's case does involve the use of immunized testimony, the constitutional violation here is much more egregious. As the Court of Military Appeals stated, Newak's former attorney acted as a prosecutor in this case, "just as surely as if he had sat at trial counsel's table." United States v. Newak, 24 M.J. at 243. The prosecution was able to take advantage of confidential information known to Smith through his prior representation of Newak. This constitutional violation goes to the very core of a defendant's right to effective assistance of counsel and due process, and no semblance of due process remains in a proceeding in which the use of such testimony is permitted.

If the Court of Military Appeals' ruling is permitted to stand, the significance of this grave constitutional violation will be reduced to an evidentiary error.

Where the basic constitutional rights to due process and effective assistance of counsel are violated in a criminal prosecution, the remedy must be commensurate with the error. In this case the harm went beyond mere evidentiary taint. In allowing an evidentiary remedy, the Court of Military Appeals has undermined the constitutional protection afforded to all citizens under the Sixth Amendment guarantee of the right to effective assistance of counsel. The Court should grant this petition to assure such a wrong is not perpetuated.

CONCLUSION

For these various reasons, this Petition for Certiorari should be granted.

Respectfully submitted,

FAITH A. SEIDENBERG
Seidenberg, Strunk & Goldenberg
246 East Water Street.
Syracuse, New York 13202
Tel: (315) 422-0144

Counsel of Record

November 7, 1989

(Appendix UNDER SEPARATE COVER)

FOOTNOTES:

[1] The remaining charges which were heard at the court-martial are set forth in the Staff Judge Advocate Review of court-martial, dated 06 May 1982, set forth in the Appendix at pages 75 to 103.

2 The Advice of the Staff Judge Advocate, dated 04 February 1982, recommended that specifications 2, 3 and 4 of Charge IV be dismissed.

Pursuant to this recommendation, these charges were dismissed prior to the trial by court-martial.

The Staff Judge Advoate Review of 06 May 1982, set forth in the Appendix at pages 75 to 103, recommended that the findings of guilty of Specifications 1 and 2 of Charge I not be approved, and that the findings of guilty on Charge II and its specification be reduced to finding of guilty of the lesser included offense of attempted possession of amphetamines.

On 10 June 1982 the Convening Authority issued General Court-Martial Order No. 9, set forth in the Appendix at pages 104 to 108, in which it disapproved the Findings of Guilty of Specifications 1 and 2 of Charge I and, with respect to Charge II, approved guilty findings only of an attempted violation. Except for a reduction in the period of confinement to six years, the remaining findings and sentence were approved.

On 23 March 1983, by Action of the Judge Advocate General, set forth in the Appendix at page 116, all confinement in excess of three years was remitted. Lt. Newak served fourteen months at Leavenworth Prison and was then paroled.

89-757

89-757

No.

Supreme Court, U.S.
FILED
NOV 7 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court Of The United States

October Term, 1989

JOANNE C. NEWAK,

Petitioner,

vs.

UNITED STATES,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

FAITH A. SEIDENBERG
Seidenberg, Strunk and Goldenberg
246 East Water Street
Syracuse, New York 13202
(315) 422-0144
Counsel of Record

November 7, 1989

Appellate Productions, Inc.
Syracuse, New York

TABLE OF CONTENTS

1.	Charge sheet, 23 October 1981	1-6
2.	Investigating Officer Report, 06 November 1981	7-22
3.	Amended charge sheet, 31 December 1981	23-28
4.	Additional charge sheet, 31 December 1981	29-31
5.	Investigating Officer Report, 08 January 1982	32-47
6.	Advice and Recommendations on Court-Martial charges, 04 February 1982	48-65
7.	Special Order AB-9, 06 February 1982	66-67
8.	Request for trial by court, 10 March 1982	68-69
9.	Report of Result of Trial, 11 March 1982	70-72
10.	Substitution Convening Authority, 12 April 1982	73
11.	Certificate of Correction, 20 April 1982	74

12. Staff Judge Advocate's Review, 06 May 1982 75-103

13. General Court Martial Order No. 9, 10 June 1982 104-108

14. Opinion of Court of Military Review, 14 December 1982 109-115

15. JAG Review, 23 March 1983 116

16. Opinion of Court of Military Appeals, 13 July 1987 117-132

17. Order of Court of Military Appeals, 19 August 1987 133-134

18. Opinion of Court of Military Review, 16 October 1987 135-141

19. General Court Martial Order No. 100, 01 December 1987 142

20. General Court Martial Order No. 150, 14 January 1988 143

21. General Court Martial Order No. 23, 15 January 1988 144

22. Special Order, AB-33,
27 January 1988 145

23. General Court Martial
Order No. 87,
28 July 1988 146-148

24. Opinion of Court of Military Review,
06 January 1989 149-155

25. Opinion of Court of Military Appeals,
06 September 1989 156-157

CHARGE SHEET

Place:
Hancock Field, New York 13225
Date:
23 October 1981
Accused: (Last name, First name, Middle initial)
Joann C. Newak
Social Security account number
167-38-0452
Grade or rank
Second Lieutenant
Pay Grade
0-1
Organization and armed service:
21st Air Division
United States Air Force
Date of Birth
24 October 1957
Contribution to Family
N/A
Pay per month
basic $1099.80
SEA
None
Total
$1099.80

RECORD OF SERVICE

Initial date of current service
29 November 1979
Term of current service
4 years
Prior service:
00 years 03 months 00 days
29 August 1979 - 29 November 1979 USAF

DATA AS TO WITNESSES

Name of witness
Amn Donna L. Ryan

Miss Julie Michalzuk
Miss Joann Forbes

Address
4789 ABG,
Hancock Fld, NY

Watertown, NY

Liverpool, NY

Witness for Prosecution/Accused
X
X
X

DOCUMENTS AND OBJECTS

List and describe (If not attaached to charges, note where may be found)
US Army Criminal Investigations
Laboratory Report
81-CID 131-05540-C.
Remains of one pill purported to be an amphetamine.
Marijuana "roaches."

Above mentioned items can be found at OSI Det 110, Hancock Field, New York.

DATA AS TO RESTRAINT

Nature of any restraint of the accused:
NONE

CHARGE I: Violation Of the Uniform Code of Military Justice, Article 80.

Specification 1: In that SECOND LIEUTENANT JOANN C. NEWAK, United States Air Force, 2lst Air Division, did, at North Syracuse, New York, on or about 6 July 1981, attempt to violate a lawful general regulation, to wit: paragraph 3-4, Air Force Regulation 30-2, dated 22 June 1981, by wrongfully transferring a substance she believed to be amphetamines.

Specification 2: In that SECOND LIEUTENANT JOANN C. NEWAK, United States Air Force, 2lst Air Division, did, at North Syracuse, New York, on or about 6 July 1981, attempt to violate a lawful general regulation, to wit: paragraph 3-4, Air Force Regulation 30-2, dated 22 June 1981, by wrongfully using a substance she believed to be amphetamines.

Specification 3: In that SECOND LIEUTENANT JOANN C.NEWAK, United States Air Force, 2lst Air Division, did, at Clay, New York, on or about 10 July 1981, attempt to violate lawful general regulation, to wit: paragraph 3-4, Air Force Regulation 30-2, dated 22 June 1981, by wrongfully transferring a substance she believed to be amphetamines.

CHARGE II: Violation of the Uniform Code of Military Justice, Article 92.

Specification: In that SECOND LIEUTENANT JOANN C. NEWAK, United States Air Force, 21st Air Division, did, at Clay, New York, on numerous occasions, from on or about 15 December 1980, to on or about 1 September 1981, violate a lawful general regulation, to wit: paragraph 3-4, Air Force Regulation 30-2, dated 22 June 1981, and/or paragraph 4-4, Air Force Regulation 30-2, dated 8 November 1976, by wrongfully having in her possession some amphetamines.

CHARGE III: Violation of the Uniform Code of Military Justice, Article 134.

Specification 1: In that SECOND LIEUTENANT JOANN C. NEWAK, United States Air Force, 2lst Air Division, did, at Clay, New York, on numerous occasions, from on or about 15 December, 1980, to on or about 1 September 1981, wrongfully use marijuana.

Specification 2: In that SECOND LIEUTENANT JOANN C. NEWAK, United States Air Force, 2lst Air Division, did, at Clay, New York, on numerous occasions, from on or about 15 December 1980, to on or about 1 September 1981, wrongfully have in her possession some amount of marijuana.

Specification 3: In that SECOND LIEUTENANT JOANN C. NEWAK, United States Air Force 2lst Air Division, did, at Clay, New York, on numerous occasions, from on or about 15 December 1980, to on or about 1 September 1981, wrongfully transfer marijuana.

JURISDICTIONAL BASIS: The Jurisdictional Basis for the prosecution of Charges I, II and III and all Specifications thereunder is that they were committed in the presence of enlisted personnel and/or civilians that were aware of the military status of the accused as an officer; that such conduct represented a threat to the military community and a flouting of military authority; thus, under the circumstances, the military has an overriding interest in the prosecution of these offenses.

CHARGE IV: Violation of the Uniform Code of Military Justice, Article 133.

Specification 1: In that SECOND LIEUTENANT JOANN C. NEWAK, United States Air Force 2lst Air Division, did, at Hancock Field, North Syracuse, New York, on or about 17 June 198l, engage in conduct unbecoming an officer and a gentleman, to wit, wrongfully suggest to an enlisted female

person of the Air Force, that such person was bisexual and proceeded without authority to kiss the enlisted person on her cheek and say "I love you."

Specification 2: In that SECOND LIEUTENANT JOANN C NEWAK, United States Air Force, 21st Air Division, did, at Hancock Field, North Syracuse, New York, on or about 25 June 1981, engage in conduct unbecoming an officer and a gentleman, to wit: wrongfully admit to an enlisted female person of the United States Air Force, that she, Second Lieutenant Newak, was having a homosexual relationship with another enlisted female person of the United States Air Force.

JURISDICTIONAL BASIS: The Jurisdictional Basis for the prosecution of Specifications 1 and 2 of Charge IV is that they occurred on Hancock Field, New York, a United States Air Force installation within the territorial limits of the United States and that such conduct represents a flouting of military authority and a threat to the military authority; thus, under the circumstances, the military has an overriding interest in the prosecution of these offenses.

Specification 3: In that SECOND LIEUTENANT JOANN C. NEWAK, United States Air Force, 2lst Air Division, did, at Clay, New York, on or about 1 June 1981, engage in conduct unbecoming an officer and a gentleman, to wit: wrongfully admit to a civilian that she, Second Lieutenant Newak, was having a homosexual relationship with another female.

Specification 4: In that SECOND LIEUTENANT JOANN C. NEWAK, United States Air Force, 2lst Air Division, did, at Clay, New York, on or about 15 July 1981, engage in conduct unbecoming an officer and a gentleman, to wit: wrongfully kissing, hugging and holding hands with an enlisted female person of the United States Air Force.

JURISDICTIONAL BASIS: The Jurisdictional Basis for the prosecution of Specifications 3 and 4 of Charge IV is that these offenses are not commonly prosecuted in civil courts; the acts alleged impaired the accused's ability to function effectively as an officer at Hancock Field; the accused's conduct disgraced the image of the United States Officer Corps; all of the preceding represents a threat to the military community and a flouting of military authority; thus, under the circumstances, the military has an overriding interest in the prosecution of these offenses.

INVESTIGATING OFFICER'S REPORT

(Of charges under the provisions of Article 32, Uniform Code of Military Justice and paragraphs 34, MCM, U.S., 1969 (Rev.))

2d INDORSEMENT

FROM: (Grade, name and organization of investigating officer)

Major Maurice A. Deaver, Jr., 4787ABG/JA, Duluth IAP, MN 55814

DATE OF REPORT 6 Nov. 81

TO: (Title and Organization of officer who directed report to be made)

4789 ABG/CC, Hancock Field, NY

Grade and name of accused:

2Lt Joann C. Newak

SSAN

167-38-0452FV

ORGANIZATION

HQ 21st Air Division

DATE OF CHARGES

23 Oct 81

1. IN ACCORDANCE WITH THE PROVISIONS OF ARTICLE 32, UNIFORM CODE OF MILITARY JUSTICE, AND PARAGRAPH 34 MCM, 1969 (REV.), I HAVE INVESTIGATED THE CHARGES (Exhibit 1) APPENDED HERETO. (If, and as soon as, it is determined the accused elects not to be represented by counsel or by qualified counsel during the investigation, the investigating officer will complete in ink, items 1 through 4, except 4f, and will ask the accused to sign item 4c.)

YES

2. AT THE OUTSET OF THE INVESTIGATION, I READ TO THE ACCUSED THE PROVISIONS OF ARTICLE 31, UNIFORM CODE OF MILITARY JUSTICE, AND ALSO ADVISED HIM:

a. OF THE NATURE OF THE OFFENSE(S) CHARGED AGAINST HIM.

YES

b. OF THE NAME OF THE ACCUSER.

YES

c. OF THE NAMES OF THE WITNESSES AGAINST HIM SO FAR AS KNOWN BY ME.

YES

d. THAT THE CHARGES WERE ABOUT TO BE INVESTIGATED BY ME.

YES

e. THAT HE HAS A RIGHT TO CONSULT WITH AND TO OBTAIN, AND TO HAVE PRESENT DURING THIS INVESTIGATION A LAWYER, EITHER

(1) A CIVILIAN LAWYER RETAINED AT HIS OWN EXPENSE, OR

(2) MILITARY COUNSEL OF HIS OWN SELECTION, IF SUCH COUNSEL IS REASONABLY AVAILABLE, OR

(3) A MILITARY LAWYER, CERTIFIED UNDER ARTICLE 27(b), PROVIDED WITHOUT COST BY THE OFFICER EXERCISING GENERAL COURT-MARTIAL JURISDICTION. PARAGRAPH 34c, MCM.

YES

f. OF HIS RIGHT TO CROSS-EXAMINE ALL AVAILABLE WITNESSES AGAINST HIM

YES

g. OF HIS RIGHT TO PRESENT ANYTHING HE MIGHT DESIRE IN HIS OWN BEHALF, EITHER IN DEFENSE OR MITIGATION

YES

h. OF HIS RIGHT TO HAVE THE INVESTIGATING OFFICER EXAMINE AVAILABLE WITNESSES REQUESTED BY HIM

YES

i. OF HIS RIGHT TO MAKE A STATEMENT IN ANY FORM

YES

j. OF HIS RIGHT TO REMAIN SILENT OR TO REFUSE TO MAKE ANY STATEMENT REGARDING ANY OFFENSE OF WHICH HE WAS ACCUSED OR CONCERNING WHICH HE IS BEING INVESTIGATED.

YES

k. THAT ANY STATEMENT MADE BY HIM MIGHT BE USED AS EVIDENCE AGAINST HIM IN A TRIAL BY COURT-MARTIAL.

YES

3.a. THE ACCUSED REQUESTED MILITARY COUNSEL BY NAME

NO

b. NAME AND GRADE OF SUCH COUNSEL ORGANIZATION

c. MILITARY COUNSEL REQUESTED BY NAME WAS QUALIFIED WITHIN THE MEANING OF ARTICLE 27(b) UNIFORM CODE OF MILITARY JUSTICE

N/A

d. IF ANSWER TO PRECEDING ITEM WAS "NO", ACCUSED WAS INFORMED THAT SUCH UNQUALIFIED COUNSEL MAY NOT REPRESENT HIM AT ANY GENERAL COURT-MARTIAL.

N/A

e. MILITARY COUNSEL REQUESTED BY NAME WAS REASONAbLY AVAILABLE.
(If not available, explain In Ite.n 18, having reference to paragraph 34c, MCM, 1969 (Rev)).

N/A

f. THE ACCUSED STATED HE WOULD BE REPRESENTED BY CIVILIAN COUNSEL

YES

g. NAME AND ADDRESS OF SUCH COUNSEL

Ms Faith A. Seidenberg
415 University Bldg.
Syracuse, NY 13202

Member of the Bar of:

The State of New York

h. (This item to be used by accused civilian counsel only)

(Place and date)

I hereby enter my appearance for the above-named accused and represent that I am a member of the bar of:

(signature of counsel)

/s/Faith Seidenberg

State of New York

4.a. THE ACCUSED REQUESTED THAT COUNSEL BE PROVIDED BY THE GENERAL COURT-MARTIAL AUTHORITY TO REPRESENT HIM

YES

b. NAME AND GRADE OF SUCH COUNSEL

Captain David F. Eaton

ORGANIZATION

USAF Judiciary,

Plattsburgh AFB, NY

c. COUNSEL (as in b above) WAS QUALIFIED WITHIN THE MEANING OF ARTICLE 27(b) UNIFORM CODE OF MILITARY JUSTICE

YES

d. IF ANSWER TO PRECEDING ITEM (4c) IS "NO", ACCUSED SPECIFICALLY WAIVED COUNSEL WITH SUCH QUALIFICATIONS

N/A.

e. (To be signed by accused. If answer to 3a and 4a, or 4c was "NO". If accused fails to sign, investigating officer will explain the circumstances in detail in item 18)

(Date)

I have been informed of my right to representation by counsel qualified under Article 27 (b), Uniform Code of Military Justice. I hereby waive my right to (such qualified counsel) (counsel)

(Signature of accused)

f. COUNSEL FOR THE ACCUSED WAS PRESENT THROUGHOUT THE INVESTIGATION. (If the accused waives

the right to hove counsel present throughout all or a part of the investigation after having requested counsel, state the circumstances and the particular proceedings conducted in the absence of such counsel)

YES

5.a. IN THE PRESENCE OF THE ACCUSED I HAVE INTERROGATED ALL AVAILABLE WITNESSES UNDER OATH OR AFFIRMATION AND HAVE EXAMINED ALL DOCUMENTARY EVIDENCE ON BOTH SIDES.

YES

b. I HAVE REDUCED THE MATERIAL TESTIMONY GIVEN BY EACH SUCH WITNESS UNDER DIRECT AND CROSS-EXAMINATION TO A SWORN OR AFFIRMED WRITTEN STATEMENT EMBODYING THE SUBSTANCE OF THE TESTIMONY TAKEN ON BOTH SIDES.

YES

c. THE SWORN OR AFFIRMED WRITTEN STATEMENTS OF SUCH WITNESSES ARE APPENDED HERETO AS INDICATED:

NAME AND GRADE OF WITNESSES
WHO WERE PRESENT

A1C Donna L. Ryan
SA John J. Houlihan,Jr.
SRA Teresa L Gainey

ORGANIZATION OR ADDRESS

4789 ABG/SPS,
Hancock Field, NY 13225

AFOSI Det 0110,
Hancock Field, NY 13225

21st ADS,
Hancock Field, NY 13225

EXHIBIT NUMBER
11
12
13

6.a. THE SUBSTANCE OF THE EXPECTED TESTIMONY OF EACH OF THE FOLLOWING ABSENT WITNESSES WHOSE PRESENCE WAS NOT REQUESTED BY THE ACCUSED, OR WHO, HAVING BEEN REQUESTED, WERE NOT AVAILABLE, OR FOR WHOM THE REQUEST WAS WITHDRAWN, WAS OBTAINED FROM SUCH WITNESSES IN THE FORM OF A SWORN OR AFFIRMED WRITTEN STATEMENT, OR WAS STIPULATED TO BY THE ACCUSED IN WRITING. SUCH STATEMENTS OR STIPULATIONS ARE APPENDED HERETO AS INDICATED:

NAME AND GRADE OF ABSENT WITNESSES
Julie Michalzuk, Civilian
Julie Michalzuk, Civilian
SRA Lynn E. Peelman

ORGANIZATION OR ADDRESS
Watertown,NY
Watertown,NY
21st ADS,
Hancock Field, NY 13225

EXHIBIT NUMBER
7
8
9

b. A COPY OF EACH SUCH WRITTEN STATEMENT HAS BEEN SHOWN TO THE ACCUSED.
YES

c. IF AN ABSENT WITNESS IS REQUESTED BY THE ACCUSED BUT IS NOT AVAILABLE, ENTER A PROPER EXPLANATION

7.a. THE FOLLOWING DOCUMENTS HAVE BEEN EXAMINED, SHOWN TO THE ACCUSED, AND ARE APPENDED AS INDICATED (describe documents)

Stmt of A1C Donna L. Ryan, dtd 7 July 1981
Stmt of A1C Donna L. Ryan, dtd 11 July 1981
Stmt of A1C Donna L. Ryan, dtd 22 June 1981

b. IF ANY DOCUMENTS MADE AVAILABLE TO THE INVESTIGATING OFFICER WERE NOT EXAMINED OR WERE EXAMINED BUT NOT SHOWN TO THE ACCUSED, OR WERE EXAMINED BUT ARE NOT APPENDED, STATE THE REASONS:

8.a. THE FOLLOWING DESCRIBED REAL EVIDENCE WAS EXAMINED, SHOWN TO THE ACCUSED, AND IS NOW PRESERVED FOR SAFEKEEPING AS INDICATED:

AFOSI Det 0110, Hancock Field, NY
Remains of three alleged marijuana cigarette butts
Remains of one tablet

YES

b. IF CERTAIN REAL EVIDENCE WHICH WAS EXAMINED WAS NOT SHOWN TO THE ACCUSED, STATE THE REASONS.

N/A

9. THE ACCUSED AFTER HAVING BEEN INFORMED OF HIS RIGHT TO MAKE A STATEMENT OR REMAIN SILENT:

a. HE DID HOT DESIRE TO MAKE A STATEMENT.

YES

b. MADE A STATEMENT APPENDED HERETO (Exhibit)

NO

c. THE CIRCUMSTANCES OF THE TAKING OF ANY CONFESSION OR ADMISSION OF ACCUSED WERE INQUIRED INTO BY ME AND SUCH CONFESSION OR ADMISSION APPEARS TO HAVE BEEN OBTAINED IN ACCORDANCE WITH ARTICLE 31, UNIFORM CODE OF MILITARY JUSTICE AND/ORTHE 5TH AMENDMENT. (Where appropriate, attach statement of person taking confession or

admission showing circumstances of taking).

YES

d. THE ACCUSED, AFTER BEING ADVISED THAT HE DID NOT HAVE TO MAKE ANY STATEMENT WITH RESPECT TO IT, WAS SHOWN THE CONFESSION OR ADMISSION AND DID NOT CONTEST IT AS BEING NOT IN COMPLIANCE WITH ARTICLE 31 UNIFORM CODE OF MILITARY JUSTICE. (If the confession or admission was contested, attach accused's explanation of the circumstances.)

YES

10.a. THERE WERE REASONABLE GROUNDS FOR INQUIRING INTO THE MENTAL RESPONSIBILITY OF THE ACCUSED AT THE TIME OF THE ALLEGED OFFENSE (MCM, 120b)

NO

b. THERE WERE REASONABLE GROUNDS FOR INQUIRING INTO THE MENTAL CAPACITY OF THE ACCUSED AT THE TIME OF THE INVESTIGATION (MCM 120c)

NO

c. IF GROUNDS FOR INQUIRY AS TO THE ACCUSED'S MENTAL CONDITION EXISTS, STATE REASONS THEREFOR AND ACTION TAKEN

N/A

d. A REPORT OF A (BOARD OF MEDICAL OFFICERS) (PSYCHIATRIST) IS APPENDED (Exhibit)

NO

11. ALL ESSENTIAL WITNESSES WILL BE AVAILABLE IN THE EVENT OF TRIAL. (If any essential witness(s) will not be so available, list name, address, reason for unavailability, and recommendation, if any, whether a deposition should be taken. List estimated date of separation and/or transfer, if pertinent and available)

Julie Michalzuk and Joann Forbes will not appear unless subpoenaed.

Airman John Liles and SRA Lynn E. Peelman are unavailable by reason of privilege.

NO

12. EXPLANATORY OR EXTENUATING CIRCUMSTANCES ARE SUBMITTED HEREWITH.

NO

13.a. I HAVE INVESTIGATED AND FIND 0 PREVIOUS CONVICTIONS OF OFFENSES COMMITTED WITHIN THE SIX YEARS NEXT PRECEDING THE COMMISSION OF AN OFFENSE WITH WHICH THE ACCUSED IS NOW CHARGED (MCM, 1969, (Rev.) par 75 b (2)

b. AN EXTRACT COPY OF THE ACCUSED'S MILITARY RECORDS OF PREVIOUS CONVICTIONS IS APPENDED (Exhibit)

NO

14. IN ARRIVING AT MY CONCLUSIONS I HAVE CONSIDERED NOT ONLY THE NATURE OF THE OFFENSE(S) AND THE EVIDENCE IN THE CASE, BUT I HAVE LIKEWISE CONSIDERED THE AGE OF THE ACCUSED, HIS MILITARY SERVICE, AND THE ESTABLISHED POLICY THAT TRIAL BY GENERAL COURT-MARTIAL WILL BE RESORTED TO ONLY WHEN THE CHARGES CAN BE DISPOSED OF IN NO OTHER MANNER CONSISTENT WITH MILITARY DISCIPLINE.

YES

15. THE CHARGES AND SPECIFICATIONS ARE IN PROPER FORM AND THE MATTERS CONTAINED THEREIN ARE TRUE, TO THE BEST OF MY KNOWLEDGE AND BELIEF. (If the answer is "NO" explain and indicate recommended action on additional sheet).

NO

16. ANY INCLOSURES RECEIVED BY ME WITH THE CHARGES AND NOT LISTED ABOVE AS AN EXHIBIT ARE SECURELY FASTENED TOGETHER AND APPENDED HERETO AS ONE EXHIBIT (exhibit If no such inclosures were received check "NO".)

NO

17. (Check appropriate box ONLY if trial is recommended)
TRIAL BY GENERAL SPECIAL SUMMARY COURT-MARTIAL IS RECOMMENDED.

NO

18. REMARKS (If more space is required, attach additional sheets. Check X YES NO If additional sheets are attached.

7a. (cont.)

Extract from AFOSI Report	I.O. Ex.	5
Laboratory Report	I.O. Ex.	6

15. The elements of the offenses charged are at I. O. Exhibit 14.

The accused's civilian counsel, Ms Faith Seidenberg, entered her appearance and represented that she is a member of the Bar of the State of New York.

The proof of the charges and specifications is set out below.

Charge I, Specifications 1, 2 and 3: The only evidence to support the transfer or use by the accused of any substance on or about 6 July 1981 and 10 July 1981 is the testimony of A1C Ryan. The third person allegedly present and involved, Airman Liles, was unavailable on account of privilege, having been advised by Captain

Catania, Area Defense Counsel, Pease AFB, not to testify. A1C Ryan stated that the accused called the tablets "speed" and "speckled eggs." Aside from the common knowledge that "speed" is generally a term associated with amphetamines, there was no evidence as to whether the accused actually believed that any tablets transferred or used were amphetamines or some uncontrolled substance.

Charge II, Specification 1: The only evidence available to support this specification and charge is I.O. Exhibit 8, the sworn statement of Julie Michalzuk, a civilian housemate of the accused. Ms. Michalzuk was invited to attend this investigation and declined. See I. O. Exhibit 12. Her sworn statement is devoid of detail. She asserts that she saw the accused in possession of amphetamines and that they were solid black capsules. The statement does not detail the time period during which the alleged possession occurred, the location of the possession, or the manner in which the witness was able to identify the capsules as amphetamines, as opposed to some uncontrolled substance.

Charge III, Specifications 1, 2 and 3: The evidence in support of these specifications consists of the testimony of A1C Ryan and I. O. Exhibit 8, the sworn statement of Ms. Michalzuk. Airman Ryan's statement relates to one evening, 10 July 1981, on which the accused allegedly possessed, used, and transferred marijuana. Ryan was familiar with the appearance and smell of marijuana. There were, according to her testimony, seven persons present later that evening aside from the accused and herself. The sum total of the evidence obtained from all these potential witnesses was I. O. Exhibit 8, the sworn statement of Ms Michalzuk alluded to earlier. I.O. Exhibit 8 speaks in general terms of possession and use of marijuana by the accused at the apartment. However, the statement is so general that it cannot be said to relate specifically to the same incident about which Ryan testified. I. O. Exhibit 8

stands alone as to the proof of the numerous other uses, possessions, and transfers of marijuana alleged between 15 December 1980 and 1 September 1981. Again, the statement shows no basis for Ms. Michalzuk's conclusion that what she observed the accused use and possess was, in fact, marijuana.

Charge IV, Specification 1: The evidence to support this specification is the testimony of A1C Ryan. Ryan testified that the accused kissed her on the neck, not the cheek, as alleged.

Charge IV, Specification 2: The testimony of A1C Ryan is the only evidence on this specification. A1C Ryan was the enlisted person to whom the statements were allegedly made. SRA Peelman was the enlisted person with whom the accused allegedly was having the homosexual relationship. Ryan testified that the conversation took place on or about 9 July 1981, not 25 June 1981, as alleged.

-- continued--

19. I HAVE NO PREVIOUS CONNECTION WITH THIS CASE OR ANY CLOSELY RELATED CASE. (If any connection is indicated, attach a full explanation.) I AM NOT AWARE OF ANY REASONS WHICH WOULD DISQUALIFY ME FROM ACTING AS INVESTIGATING OFFICER. (If any reasons appear to exist, attach a statement giving full details.)

Typed name, grade and organization of investigating officer

MAURICE A. DEAVER, Jr.
Major, USAF
4787 ABG/JA
Duluth IAP,
Mn 55814

15. (cont).

Charge IV, Specification 3: I. O. Exhibit 7, the sworn statement of Ms. Michalzuk, is the only evidence to support this specification. Her statement indicates the accused's statement to the effect that she was having a sexual relation with another female (Peelman), was made "around the first part of June 1981."

Charge IV, Specification 4: The only evidence adduced which could support this specification is I. O. Exhibit 7, the Michalzuk statement. The statement does not specify any date. While it states that the accused was kissing Peelman, it does not make mention the accused hugging or holding hands with Peelman as alleged.

SRA Peelman was represented by counsel, Captain Smith, Area Defense Counsel, Griffiss AFB, NY. Capt Smith informed me that he had advised her not to testify. She was, therefore, unavailable by reason of assertion of her Article 31 rights. In I. O. Exhibit 9, she denies having had any homosexual relations with the accused. In I. O. Exhibit 10 is a statement of the accused generally denying any homosexual activity with SRA Peelman.

Matters Raised By Defense:

The Defense objected to witness Ryan's reading of I.O. Exhibits 2, 3, and 4 prior to adopting them on the stand. The Defense objected to the use of any hearsay being used as evidence, particularly the testimony summarized in paragraphs 5 and 6 of I. O. Exhibit 11.

The Defense objected to the testimony of SA Houlihan regarding his discussion with Julie Michalzuk as to whether she would appear at this investigation by invitation as hearsay.

The Defense objected to the use of I. O. Exhibit 5, para. 9.

The Defense objected to the consideration of I. O. Exhibit 10 on the basis that it was hearsay and contained no admissions which would make it subject to any exception to the hearsay rule.

The Defense moved to dismiss Charges I and II and their specifications, there being no evidence that any amphetamines were ever used, transferred, or possessed.

The Defense made a general objection to the use of any written statements and any hearsay testimony.

The Defense requested the Investigating Officer to examine an unspecified AFOSI regulation to determine whether once an individual is considered a suspect whether the appropriate procedure is to "establish a controlled situation," citing the delays between Ryan's alleged acquisition of evidence from the accused and its disposition with the OSI. I made no such examination.

Comments:

In each of the specifications of Charge I, persons other than A1C Ryan and the accused were present. Among these persons were Airman Liles, Ms. Michalzuk, Ms. Forbes, and SRA Peelman. The evidence actually adduced in the hearing pales in comparison to that which was unavailable.

15.(cont.)

The specification of Charge II is not supported by credible evidence.

The specifications of Charge III are supported only as to one date, July 10th, and even then the available evidence is once again dwarfed by that which is unavailable.

Charge IV, Specification 1 is supported by the evidence, with the exception that the word "neck" should be substituted for "cheek." The specification should also be amended to include the words, "or words to that effect" after the words "I love you." Although the specification alleges a series of actions by the accused, the actions constitute a course of conduct, and are properly alleged as one specification. MCM Para 28b, U.S. v Yeast, 36 C.M.R. 890 (ACM, 1966). In my opinion, the specification states an offense under Article 133.

Charge IV, Specification 4 is not supported as to the date alleged and not supported as to allegations of hugging and holding hands by the accused.

Charge IV, Specifications 2 and 3: Both these specifications allege that the mere utterance by the accused of words which indicated she was having a homosexual relationship with an enlisted female was a criminal act, regardless of whether there was any truth to those words. I have some doubt as to whether the mere utterance of these words, in the words of Parker v. Levy, 417 U.S. 733, 753, 94 S.Ct. 2547, 2560, 41 L.Ed 2d 439 (1974), "offend/s/ so seriously against law, justice, morality, or decorum as to expose to disgrace, socially or as a man, the offender, and at the same time /is/of such a nature or committed under such circumstances as to bring dishonor or disrepute upon the military profession which he represents."

Assuming these specifications state offenses, the question is raised as to whether the statements alleged should be pleaded, as nearly as possible, in exact words (MCM, Par 28c) and whether they ought to name the person

to whom the statements were made for purposes of specificity.

One question which has arisen and was recognized by me only after the investigation was closed, is whether and to what extent any utterances alleged to have been made by the accused in Charge IV, Specification 2 were solicited by A1C Ryan, who was then an OSI informant. If such utterances were made as a result of the inquiry of A1C Ryan, then the crime could well have been one instigated by the government, as opposed to the accused.

17. Recommendations:

I recommend that action be taken to depose Ms. Julie Michalzuk and Ms Joann Forbes or to obtain more detailed sworn statements regarding the offenses alleged. I also recommend that action be taken to make available as witnesses SRA Lynn E. Peelman and Amn John Liles. I would then recommend that this Article 32 Investigation be reopened.

CHARGE SHEET

Place:
Hancock Field, New York 13225
Date:
23 October 1981
31 December 1981
Accused: (Last name, First name, Middle initial)
Joann C. Newak
Social Security account number
167-38-0452
Grade or rank
Second Lieutenant
Pay Grade
0-1
Organization and armed service
21st Air Division
United States Air Force
Date of Birth:
24 October 1957
Contribution to Family
N/A
Pay per month
basic $1099.80
SEA
None
Total
$1099.80

RECORD OF SERVICE

Initial date of current service
29 November 1979
Term of current service
4 years
Prior service:
00 years 03 months 00 days

29 August 1979 - 29 November 1979 USAF

DATA AS TO WITNESSES

Name of witness

Amn Donna L. Ryan
Julie Michalzuk
Joann Forbes

Address

4789 ABG,
Hancock Fld, NY

Watertown, NY

Liverpool, NY

Witness for Prosecution/Accused

X
X
X

DOCUMENTS AND OBJECTS

List and describe (If not attached to charges, note where they may be found)

US Army Criminal Investigations
Laboratory Report
81-CID 131-05540-C.

Remains of one pill purported to be an amphetamine.
Marijuana "roaches."

Above mentioned items can be found at OSI Det 110, Hancock Field, New York.

DATA AS TO RESTRAINT

Nature of any restraint of the accused:

NONE

CHARGE I: Violation Of the Uniform Code of Military Justice, Article 80.

Specification 1: In that SECOND LIEUTENANT JOANN C. NEWAK, United States Air Force, 2lst Air Division, did, at North Syracuse, New York, on or about 6 July 1981, attempt to violate a lawful general regulation, to wit: paragraph 3-4, Air Force Regulation 30-2, dated 22 June 1981, by wrongfully transferring a substance she believed to be amphetamines.

Specification 2: In that SECOND LIEUTENANT JOANN C. NEWAK, United States Air Force, 2lst Air Division, did, at North Syracuse, New York, on or about 6 July 1981, attempt to violate a lawful general regulation, to wit: paragraph 3-4, Air Force Regulation 30-2, dated 22 June 1981, by wrongfully using a substance she believed to be amphetamines.

Specification 3: In that SECOND LIEUTENANT JOANN C.NEWAK, United States Air Force, 2lst Air Division, did, at Clay, New York, on or about 10 July 1981, attempt to violate lawful general regulation, to wit: paragraph 3-4, Air Force Regulation 30-2, dated 22 June 1981, by wrongfully transferring a substance she believed to be amphetamines.

CHARGE II: Violation of the Uniform Code of Military Justice, Article 92.

Specification: In that SECOND LIEUTENANT JOANN C. NEWAK, United States Air Force, 21st Air Division, did, at Clay, New York, ~~on numerous occasions,~~ from on or about 15 December 1980, to on or about 1 September 1981, violate a lawful general regulation, to wit: paragraph 3-4, Air Force Regulation 30-2, dated 22 June 1981, and/or paragraph 4-4, Air Force Regulation 30-2, dated 8 November 1976, by wrongfully having in her possession some amphetamines.

CHARGE III: Violation of the Uniform Code of Military Justice, Article 134.

Specification 1: In that SECOND LIEUTENANT JOANN C. NEWAK, United States Air Force, 2lst Air Division, did, at Clay, New York, on numerous occasions, from on or about 15 December, 1980, to on or about 1 September 1981, wrongfully use marijuana.

Specification 2: In that SECOND LIEUTENANT JOANN C. NEWAK, United States Air Force, 2lst Air Division, did, at Clay, New York, on numerous occasions, from on or about 15 December 1980, to on or about 1 September 1981, wrongfully have in her possession some amount of marijuana.

Specification 3: In that SECOND LIEUTENANT JOANN C. NEWAK, United States Air Force 2lst Air Division, did, at Clay, New York, on numerous occasions, from on or about 15 December 1980, to on or about 1 September 1981, wrongfully transfer marijuana.

JURISDICTIONAL BASIS: The Jurisdictional Basis for the prosecution of Charges I, II and III and all Specifications thereunder is that they were committed in the presence of enlisted personnel and/or civilians that were aware of the military status of the accused as an officer; that such conduct represented a threat to the military community and a flouting of military authority; thus, under the circumstances, the military has an overriding interest in the prosecution of these offenses.

CHARGE IV: Violation of the Uniform Code of Military Justice, Article 133.

DBS

Specification 1: In that SECOND LIEUTENANT JOANN C. NEWAK, United States Air Force 2lst Air Division, did, at

Hancock Field, North Syracuse, New York, on or about 17 June 198l, engage in conduct unbecoming an officer and a gentleman, to wit, wrongfully suggest to an enlisted female person of the Air Force, that such person was bisexual and proceeded without authority to kiss the enlisted person on her ~~cheek~~ neck and say "I love you."

~~Specification 2: In that SECOND LIEUTENANT JOANN~~ C NEWAK, United States Air Force, 21st Air Division, did, at Hancock Field, North Syracuse, New York, on or about 25 June 1981, engage in conduct unbecoming an officer and a gentleman, to wit: wrongfully admit to an enlisted female person of the United States Air Force, that she, Second Lieutenant Newak, was having a homosexual relationship with another enlisted female person of the United States Air ~~Force~~.

JURISDICTIONAL BASIS: The Jurisdictional Basis for the prosecution of Specifications ~~1 and 2~~ of Charge IV is that they occurred on Hancock Field, New York, a United States Air Force installation within the territorial limits of the United States and that such conduct represents a flouting of military authority and a threat to the military authority; thus, under the circumstances, the military has an overriding interest in the prosecution of these offenses.

~~Specification 3: In that SECOND LIEUTENANT JOANN~~ C. NEWAK, United States Air Force, 2lst Air Division, did, at Clay, New York, on or about 1 June 1981, engage in conduct unbecoming an officer and a gentleman, to wit: wrongfully admit to a civilian that she, Second Lieutenant Newak, was having a homosexual relationship with another female.

Specification 4: In that SECOND LIEUTENANT JOANN C. NEWAK, United States Air Force, 2lst Air Division, did, at Clay, New York, on or about 15 July 1981, engage in

conduct unbecoming an officer and a gentleman, to wit: wrongfully kissing, hugging and holding hands with an enlisted female person of the United States Air Force.

JURISDICTIONAL BASIS: The Jurisdictional Basis for the prosecution of Specifications 3 and 4 of Charge IV is that these offenses are not commonly prosecuted in civil courts; the acts alleged impaired the accused's ability to function effectively as an officer at Hancock Field; the accused's conduct disgraced the image of the United States Officer Corps; all of the preceding represents a threat to the military community and a flouting of military authority; thus, under the circumstances, the military has an overriding interest in the prosecution of these offenses. DCS

ADDITIONAL CHARGE SHEET

Place:
Hancock Field, New York 13225
Date:
31 December, 1981
Accused: (Last name, First name, Middle initial)
Joann C. Newak
Social Security account number
167-38-0452
Grade or rank
Second Lieutenant
Pay Grade
0-1
Organization and armed service
21st Air Division
United States Air Force
Date of Birth
24 October 1957
Contribution to Family
N/A
Pay per month
basic $1099.80
SEA
None
Total
$1099.80

RECORD OF SERVICE

Initial date of current service:
29 November 1979
Term of current service
4 years
Prior service:
00 years 03 months 00 days
29 August 1979 - 29 November 1979 USAF

DATA AS TO WITNESSES

Name of witness

Amn Donna L. Ryan

Miss Julie Michalzuk

Miss Joann Forbes

Address

4789 ABG,
Hancock Fld., NY

Watertown, NY

Liverpool, NY

Witness for Prosecution/Accused

X
X
X

DOCUMENTS AND OBJECTS

List and describe (If not attached to charges, note where it may be found)

US Army Criminal Investigations Laboratory Report # 81-CID 131-05540-C.

Remains of one pill purported to be an amphetamine.

Marijuana "roaches."

Above mentioned items can be found at OSI Det 110, Hancock Field, New York.

DATA AS TO RESTRAINT

Nature of any restraint of the accused:

None

ADDITIONAL CHARGE: Violation Of the Uniform Code of Military Justice, Article 125.

Specification 1: In that SECOND LIEUTENANT JOANN C. NEWAK, United States Air Force, 2lst Air Division, did, at Clay, New York, on numerous occasions from or about 27 May 1981, to on or about 1 September 1981, commit sodomy with Senior Airman Lynne E. Peelman

Specification 2: In that SECOND LIEUTENANT JOANN C. NEWAK, United States Air Force, 2lst Air Division, did, at Vandling, Pennsylvania, on or about 4 July 1981, commit sodomy with Senior Airman Lynne E. Peelman.

Specification 3: In that SECOND LIEUTENANT JOANN C.NEWAK, United States Air Force, 2lst Air Division, did, at Lexington, Virginia, on or about August 1, 1981, commit sodomy with Senior Airman Lynne E. Peelman.

JURISDICTIONAL BASIS: The Jurisdictional Basis for the prosecution of the Additional Charge and all Specifications thereunder is that they were committed in the presence and with an enlisted person of the United States Air Force; that such conduct represented a threat to the military community and a flouting of military authority; the acts alleged impaired the accused's ability to function effectively as an officer at Hancock Field,; the accused's conduct disgraced the image of the United States Officer Corp; thus, under the circumstances, the military has an overriding interest in the prosecution of these offenses.

INVESTIGATING OFFICER'S REPORT

(Of charges under the provisions of Article 32, Uniform Code of Military Justice and paragraphs 34, MCM, U.S., 1969 (Rev.))

4th INDORSEMENT

FROM: (Grade, name and organization of investigating officer)

Lt Col Lawrence H. Gingold,
4787ABG/JA,
Hancock Field, NY 13225

DATE OF REPORT 8 Jan 1982

TO: (Grade, name and organization of investigating officer)

4789 ABG/CC, Hancock Field, NY

Grade and name of accused

2Lt Joann C. Newak

SSAN

167-38-0452FV

ORGANIZATION

HQ 21st Air Division

DATE OF CHARGES 23 Oct 81
31 Dec 1981

1. IN ACCORDANCE WITH THE PROVISIONS OF ARTICLE 32, UNIFORM CODE OF MILITARY JUSTICE, AND PARAGRAPH 34 MCM, 1969 (REV.), I HAVE INVESTIGATED THE CHARGES (Exhibit 1) APPENDED HERETO. (if, and as soon as, it is determined the accused elects not to be represented by counsel or by qualified counsel during the investigation, the investigating officer will complete in ink, items 1 through 4, except 4f, and will ask the accused to sign item 4c.)

YES

2. AT THE OUTSET OF THE INVESTIGATION, I READ TO THE ACCUSED THE PROVISIONS OF ARTICLE 31, UNIFORM CODE OF MILITARY JUSTICE, AND ALSO ADVISED HIM:

a. OF THE NATURE OF THE OFFENSE(S) CHARGED AGAINST HIM.

YES

b. OF THE NAME OF THE ACCUSER.

YES

c. OF THE NAMES OF THE WITNESSES AGAINST HIM SO FAR AS KNOWN BY ME.

YES

d. THAT THE CHARGES WERE ABOUT TO BE INVESTIGATED BY ME.

YES

e. THAT HE HAS A RIGHT TO CONSULT WITH AND TO OBTAIN, AND TO HAVE PRESENT DURING THIS INVESTIGATION A LAWYER, EITHER

(1) A CIVILIAN LAWYER RETAINED AT HIS OWN EXPENSE, OR

(2) MILITARY COUNSEL OF HIS OWN SELECTION, IF SUCH COUNSEL IS REASONABLY AVAILABLE, OR

(3) A MILITARY LAWYER, CERTIFIED UNDER ARTICLE 27(b), PROVIDED WITHOUT COST BY THE OFFICER EXERCISING GENERAL COURT-MARTIAL JURISDICTION. PARAGRAPH 34c, MCM.

YES

f. OF HIS RIGHT TO CROSS-EXAMINE ALL AVAILABLE WITNESSES AGAINST HIM

YES

g. OF HIS RIGHT TO PRESENT ANYTHING HE MIGHT DESIRE IN HIS OWN BEHALF, EITHER IN DEFENSE OR MITIGATION

YES

h. OF HIS RIGHT TO HAVE THE INVESTIGATING OFFICER EXAMINE AVAILABLE WITNESSES REQUESTED BY HIM

YES

i. OF HIS RIGHT TO MAKE A STATEMENT IN ANY FORM

YES

j. OF HIS RIGHT TO REMAIN SILENT OR TO REFUSE TO MAKE ANY STATEMENT REGARDING ANY OFFENSE OF WHICH HE WAS ACCUSED OR CONCERNING WHICH HE IS BEING INVESTIGATED.

YES

k. THAT ANY STATEMENT MADE BY HIM MIGHT BE USED AS EVIDENCE AGAINST HIM IN A TRIAL BY COURT-MARTIAL.

YES

3.a. THE ACCUSED REQUESTED MILITARY COUNSEL BY NAME

NO

b. NAME AND GRADE OF SUCH COUNSEL

ORGANIZATION

c. MILITARY COUNSEL REQUESTED BY NAME WAS QUALIFIED WITHIN THE MEANING OF ARTICLE 27(b) UNIFORM CODE OF MILITARY JUSTICE

N/A

d. IF ANSWER TO PRECEDING ITEM WAS "NO", ACCUSED WAS INFORMED THAT SUCH UNQUALIFIED COUNSEL MAY NOT REPRESENT HIM AT ANY GENERAL COURT-MARTIAL.

N/A

e. MILITARY COUNSEL REQUESTED BY NAME WAS REASONAbLY AVAILABLE.
(If not available, explain in item 18, having reference to paragraph 34c, MCM, 1969 (Rev)).

N/A

f. THE ACCUSED STATED HE WOULD BE REPRESENTED BY CIVILIAN COUNSEL

YES

g. NAME AND ADDRESS OF SUCH COUNSEL

Ms Faith A. Seidenberg
415 University Bldg.
Syracuse, NY 13202

Member of the Bar of:
The State of New York

h. (This item to be used by accused civilian counsel only)

(Place and date)

I hereby enter my appearance for the above-named accused and represent that I am a member of the bar of:

(signature of counsel)

/s/Faith Seidenberg

State of New York

4.a. THE ACCUSED REQUESTED THAT COUNSEL BE PROVIDED BY THE GENERAL COURT-MARTIAL AUTHORITY TO REPRESENT HIM

YES

b. NAME AND GRADE OF SUCH COUNSEL

Captain David F. Eaton

ORGANIZATION

ODIN, HO, USAF
Trial Judiciary,
Area Defense Counsel
Plattsburgh AFB, NY

c. COUNSEL (as in b above) WAS QUALIFIED WITHIN THE MEANING OF ARTICLE 27(b) UNIFORM CODE OF MILITARY JUSTICE

YES

d. IF ANSWER TO PRECEDING ITEM (4c) IS "NO", ACCUSED SPECIFICALLY WAIVED COUNSEL WITH SUCH QUALIFICATIONS

N/A.

e. (To be signed by accused. If answer to 3a and 4a, or 4c was "NO". If accused fails to sign, investigating officer will explain the circumstances in detail in item 18)

(Date)

I have been informed of my right to representation by counsel qualified under Article 27 (b), Uniform Code of Military Justice. I hereby waive my right to (such qualified counsel) (counsel)

(signature of accused)

f. COUNSEL FOR THE ACCUSED WAS PRESENT THROUGHOUT THE INVESTIGATION. (If the accused waives the right to hove counsel present throughout all or a part of the investigation after having requested counsel, state the circumstances and the particular proceedings conducted in the absence of such counsel)

YES

5.a. IN THE PRESENCE OF THE ACCUSED I HAVE INTERROGATED ALL AVAILABLE WITNESSES UNDER OATH OR AFFIRMATION AND HAVE EXAMINED ALL DOCUMENTARY EVIDENCE ON BOTH SIDES.

YES

b. I HAVE REDUCED THE MATERIAL TESTIMONY GIVEN BY EACH SUCH WITNESS UNDER DIRECT AND CROSS-EXAMINATION TO A SWORN OR AFFIRMED WRITTEN STATEMENT EMBODYING THE SUBSTANCE OF THE TESTIMONY TAKEN ON BOTH SIDES.

YES

c. THE SWORN OR AFFIRMED WRITTEN STATEMENTS OF SUCH WITNESSES ARE APPENDED HERETO AS INDICATED:

NAME AND GRADE OF WITNESSES
WHO WERE PRESENT

A1C Donna L. Ryan
SA John J. Houlihan,Jr.
SRA Teresa L Gainey
SrA John A. Liles
SRA Lynne E. Peelman
Capt Raymond D. Smith

ORGANIZATION OR ADDRESS

4789 ABG/SPS,
Hancock Fld, NY 13225

AFOSI Det 0110,
Hancock Fld, NY 13225

21 ADS,
Hancock Fld, NY 13225

4789 ABG/SPS,
Hancock Fld, NY 13225

21 ADS,
Hancock Fld, NY 13225
Area Defense Counsel
Griffiss AFB, NY

EXHIBIT NUMBER
11*
12*
13*
26
27
28

6.a. THE SUBSTANCE OF THE EXPECTED TESTIMONY OF EACH OF THE FOLLOWING ABSENT WITNESSES WHOSE PRESENCE WAS NOT REQUESTED BY THE ACCUSED, OR WHO, HAVING BEEN REQUESTED, WERE NOT AVAILABLE, OR FOR WHOM THE REQUEST WAS WITHDRAWN, WAS OBTAINED FROM SUCH WITNESSES IN THE FORM OF A SWORN OR AFFIRMED WRITTEN STATEMENT, OR WAS STIPULATED TO BY THE ACCUSED IN WRITING. SUCH STATEMENTS OR STIPULATIONS ARE APPENDED HERETO AS INDICATED:

NAME AND GRADE OF ABSENT WITNESSES
Julie Michalzuk, Civilian
Julie Michalzuk, Civilian

ORGANIZATION OR ADDRESS
Watertown,NY
Watertown,NY

EXHIBIT NUMBER

7*

8*

b. A COPY OF EACH SUCH WRITTEN STATEMENT HAS BEEN SHOWN TO THE ACCUSED.

YES

c. IF AN ABSENT WITNESS IS REQUESTED BY THE ACCUSED BUT IS NOT AVAILABLE, ENTER A PROPER EXPLANATION

7.a. THE FOLLOWING DOCUMENTS HAVE BEEN EXAMINED, SHOWN TO THE ACCUSED, AND ARE APPENDED AS INDICATED (describe documents)

Stmt of A1C Donna L. Ryan, dtd 7 July 1981
Stmt of A1C Donna L. Ryan, dtd 11 July 1981
Stmt of A1C Donna L. Ryan, dtd 22 June 1981

EXHIBIT NUMBER

2*

3*

4*

b. IF ANY DOCUMENTS MADE AVAILABLE TO THE INVESTIGATING OFFICER WERE NOT EXAMINED OR WERE EXAMINED BUT NOT SHOWN TO THE ACCUSED, OR WERE EXAMINED BUT ARE NOT APPENDED, STATE THE REASONS:

8.a. THE FOLLOWING DESCRIBED REAL EVIDENCE WAS EXAMINED, SHOWN TO THE ACCUSED, AND IS NOW PRESERVED FOR SAFEKEEPING AS INDICATED:

AFOSI Det 0110, Hancock Field, NY

Remains of three alleged marijuana cigarette butts
Remains of one tablet

*

b. IF CERTAIN REAL EVIDENCE WHICH WAS EXAMINED WAS NOT SHOWN TO THE ACCUSED, STATE THE REASONS.

N/A

9. THE ACCUSED AFTER HAVING BEEN INFORMED OF HIS RIGHT TO MAKE A STATEMENT OR REMAIN SILENT:

a. HE DID HOT DESIRE TO MAKE A STATEMENT.

YES

b. MADE A STATEMENT APPENDED HERETO (Exhibit).

N/A

c. THE CIRCUMSTANCES OF THE TAKING OF ANY CONFESSION OR ADMISSION OF ACCUSED WERE INQUIRED INTO BY ME AND SUCH CONFESSION OR ADMISSION APPEARS TO HAVE BEEN OBTAINED IN ACCORDANCE WITH ARTICLE 31, UNIFORM CODE OF MILITARY JUSTICE AND/ORTHE 5TH AMENDMENT. (Where appropriate, attach statement of person taking confession or admission showing circumstances of taking).

* see exhibit 10, exhibit 11, (page 3)

d. THE ACCUSED, AFTER BEING ADVISED THAT HE DID NOT HAVE TO MAKE ANY STATEMENT WITH RESPECT TO IT, WAS SHOWN THE CONFESSION OR ADMISSION AND DID NOT CONTEST IT AS BEING NOT IN COMPLIANCE WITH ARTICLE 31 UNIFORM CODE OF MILITARY JUSTICE. (If the confession or admission was contested, attach accused's explanation of the circumstances.)

*

10.a. THERE WERE REASONABLE GROUNDS FOR INQUIRING INTO THE MENTAL RESPONSIBILITY OF THE ACCUSED AT THE TIME OF THE ALLEGED OFFENSE (MCM, 120b)

NO

b. THERE WERE REASONABLE GROUNDS FOR INQUIRING INTO THE MENTAL CAPACITY OF THE ACCUSED AT THE TIME OF THE INVESTIGATION (MCM 120c)

NO

c. IF GROUNDS FOR INQUIRY AS TO THE ACCUSED'S MENTAL CONDITION EXISTS, STATE REASONS THEREFOR AND ACTION TAKEN

N/A

d. A REPORT OF A (BOARD OF MEDICAL OFFICERS) (PSYCHIATRIST) IS APPENDED (Exhibit)

NO

11. ALL ESSENTIAL WITNESSES WILL BE AVAILABLE IN THE EVENT OF TRIAL. (If any essential witness(s) will not be so available, list name, address, reason for unavailability, and recommendation, if any, whether a deposition should be taken. List estimated date of separation and/or transfer, if pertinent and available)

Miss Julie Michalzuk, Watertown, New York and Joann Forbes, Liverpool, NY told SA Houlihan they would not voluntarily appear for this investigation, but would testify at trial if they were subpoenaed.

SrA Lynne E. Peelman has apparent PCS to Germany in June 1982.

12. EXPLANATORY OR EXTENUATING CIRCUMSTANCES ARE SUBMITTED HEREWITH.

NO

13.a. I HAVE INVESTIGATED AND FIND 0 PREVIOUS CONVICTIONS OF OFFENSES COMMITTED WITHIN THE SIX YEARS NEXT PRECEDING THE COMMISSION OF AN OFFENSE WITH WHICH THE ACCUSED IS NOW CHARGED (MCM, 1969, (Rev.) par 75 b (2))

b. AN EXTRACT COPY OF THE ACCUSED'S MILITARY RECORDS OF PREVIOUS CONVICTIONS IS APPENDED (Exhibit)

NO

14. IN ARRIVING AT MY CONCLUSIONS I HAVE CONSIDERED NOT ONLY THE NATURE OF THE

OFFENSE(S) AND THE EVIDENCE IN THE CASE, BUT I HAVE LIKEWISE CONSIDERED THE AGE OF THE ACCUSED, HIS MILITARY SERVICE, AND THE ESTABLISHED POLICY THAT TRIAL BY GENERAL COURT-MARTIAL WILL BE RESORTED TO ONLY WHEN THE CHARGES CAN BE DISPOSED OF IN NO OTHER MANNER CONSISTENT WITH MILITARY DISCIPLINE.

YES

15. THE CHARGES AND SPECIFICATIONS ARE IN PROPER FORM AND THE MATTERS CONTAINED THEREIN ARE TRUE, TO THE BEST OF MY KNOWLEDGE AND BELIEF. (If the answer is "NO" explain and indicate recommended action on additional sheet).

NO

16. ANY INCLOSURES RECEIVED BY ME WITH THE CHARGES AND NOT LISTED ABOVE AS AN EXHIBIT ARE SECURELY FASTENED TOGETHER AND APPENDED HERETO AS ONE EXHIBIT (exhibit If no such inclosures were received check "NO").

NO

17. (Check appropriate box ONLY if trial is recommended)
TRIAL BY XX GENERAL SPECIAL SUMMARY COURT-MARTIAL IS RECOMMENDED.

18. Remarks (if more space is required, attach additional sheets

Check X Yes No If additional sheets are attached.)

7A (cont.)

Extract from AFOSI Report
IO Exhibit 5*
Laboratory Report
IO Exhibit 6*

Stmt of SrA Lynne E. Peelman,
dtd 4 Sep 81
IO Exhibit 9*
Stmt of Joann C. Newak,
dtd 4 Sep 81
IO Exhibit IO*
Special Order G-6, HQ 4789ABG,
dtd 29 Oct 81
IO Exhibit 15
Special Order G-7, HQ 47B9ABG,
dtd 1 Dec 81
IO Exhibit 16
Reserve Order JA-2O567, HQ ARPC,
dtd 22 Dec 81
IO Exhibit 17
Direction to Investigating
Officer
dtd 31 Dec 81
IO Exhibit 18
Grant of Immunity to SrA John
A. Liles,
dtd 17 Nov 81
IO Exhibit 19
Affidavit of John A. Liles,
dtd 5 Jan 82
IO Exhibit 20
Affidavit of Capt John J. Powers,
dtd 30 Dec 81
IO Exhibit 21
Grant of Immunity to SrA Lynn E. Peelman,
dtd 17 Nov 81
IO Exhibit 22
Affidavit of Lynne E. Peelman,
dtd 31 Dec 81
IO Exhibit 23
Written stmt of SrA Lynne E. Peelman,
dtd 2 Dec 81

IO Exhibit 24
AF Form 1175 & 3 pages
handwritten notes
IO Exhibit 25

* It should be noted this investigation includes the investigating officer's report of Major Maurice A. Deaver, Jr., dated 6 Nov 81, and the 14 exhibits therein contained. This investigating officer heard the testimony on 6 Jan 81 of Senior Airman John A. Liles and Senior Airman Lynne E. Peelman, government witnesses, and Captain Raymond D. Smith, Jr., called by the accused. Exhibits 15 to 30 inclusive are the direct product of this investigating officer's inquiry. Exhibits 1 to 15 inclusive and the real evidence referred to in item 8a. are the products of Major Deaver's activities and are enumerated herein for completeness.

Exhibit 29 is a verbatim statement made by accused's civilian counsel claiming the charges should be dismissed because of a conflict of interest by Capt Raymond D. Smith, Jr., Area Defense Counsel at Griffiss AFB, who at one time, represented the accused, SrA Lynne E. Peelman, and SrA John A. Liles. Subsequent to his withdrawal as counsel for the accused, Capt Smith apparently continued to represent the other parties, both of whom were granted immunity (Exhibits 19 and 22) and appeared as witnesses for the government in this matter. This investigating officer makes no recommendation on this matter which does not directly relate to the form of the charges and specifications and the truth thereof, but merely brings this to the attention of the convening authority as it will obviously be raised upon any trial and possible subsequent proceedings. Exhibits 21 and 25 were presented by accused on this subject.

The elements of the additional offenses charged are set forth at IO Exhibit 30.

15. The investigating officer has checked "no" on item 15 because of certain concern over the Charges and

Specifications.

Charge I, Specifications 1, 2 and 3: These are all based on the testimony of A1C Ryan and supported by SrA Liles. Since there is no proof the items transferred were amphetamines, and it is alleged the accused said they were "speed," a synonym for amphetamines, these offenses have been charged as attempts. An attempt requires a specific intent to commit an offense which means a court-martial must find the accuse believed the items to be speed. The witnesses apparently took the accused seriously, and the court could well find, considering the other transactions involved, that the accused thought the items in these specifications were amphetamines.

Charge II: This was initially based on the expected testimony of Julie Michalzuk, a civilian who declined to testify for the prior investigating officer and whose statement to the OSI (Exhibit 8) is not specific. However, for the period the accused an SrA Peelman had their relationship (June to August 81), SrA Peelman indicates the accused frequently had amphetamines (Exhibit 23, page 2). There is no certainty Miss Michalzuk will be found for the trial or how she will testify.

(continued)

19: I HAVE NO PREVIOUS CONFLICT WITH THIS CASE OR ANY CLOSELY RELATED CASE. (If any connection is indicated, attach a full explanation). I AM NOT AWARE OF ANY REASONS WHICH WOULD DISQUALIFY ME FROM ACTING AS INVESTIGATING OFFICER. (If any reasons appear to exist, attach a statement giving full details.)

Name

LAWRENCE H. GINGOLD

Grade

Lt. Col, USAFR

Organization

4789 ABG/JA
Hancock Fld, NY 13225

Charge III, Specifications 1, 2 and 3: The proof for the period 15 December 80 to about May 26, is dependent on the testimony of Miss Michalzuk, Exhibit 8 states, "She has friends over to smoke" but does not state she gave her friends the marijuana or anything to indicate transfer. According to the testimony of SrA Peelman, there were at least 30 transfers of marijuana from the accused to her in the 2 1/2 months of their relationship (Exhibit 23, page 2). Also, A1C Ryan and SrA Liles substantiate one incident on 10 July 1981.

Charge IV, Specification I: The testimony of A1C Ryan indicates the accused kissed her on the neck and not her cheek as alleged. (Exhibit 4)

Charge IV, Specification 2: The testimony of A1C Ryan is that this conversation took place on or about 9 July 1981 instead of 25 June 1981. (Exhibit II, page 1).

Charge IV, Specification 3: This specification, too, is based on the expected testimony of Miss Michalzuk, (Exhibit 7) which for the present, cannot be assumed to occur or be sufficient.

Charge IV, Specification 4: This specification was originally based on the expected testimony of Miss Michalzuk (Exhibit 7), but did not state hugging and holding hands. It is probable that if true, this happened with SrA Peelman but her testimony does not specifically refer to July 15, 1981.

Additional Charge, Specifications 1, 2 and 3: These are based on the testimony of SrA Peelman. Specifications 2 and 3 appear the natural consequences of Specification 1 and I0 questions whether they should be separate offenses

for sentencing purposes. While the sodomy offenses did not occur on a military installation, it is my understanding such jurisdiction has been upheld by an Air Force Court of Military Review in US v. Coronado, 11 MJ 522, which case has been argued before the Court of Military Appeals, but has not yet been decided.

17. Recommendations as to Charges and Specifications:

A. Specification 3 and 4 of Charges IV should be dismissed.

B. All other Charges and Specifications should be referred to trial but the following changes should be made:

1. Charge II, Specification - 15 December 1980 be deleted and 1 June 1981 be inserted instead.

2. Charge III, Specification 1 - 15 December 1980 be deleted and 27 May 1981 be inserted instead.

3. Charge III, Specification 2 15 December 1980 be deleted and 27 May 1981 be inserted instead.

4. Charge III, Specification 3 - 15 December 1980 be deleted and 27 May 1981 be inserted instead.

5. Charge IV, Specification 1 - the word, "cheek" be deleted and the word, "neck" be inserted instead.

6. Charge IV, Specification 2 - 25 June 1981 be deleted and 9 July 1981 be inserted instead.

Other Comments:

SrA Peelman, SrA Liles and A1C Ryan will be subject to extensive cross-examination upon any trial because prior inconsistent statements, voluntary participation, immunity, alcohol abuse, etc. This IO did not hear A1C Ryan's testimony, but SrA Peelman and Liles were satisfactory witnesses for the government at the Article 32 Investigation. Nevertheless, they and all other witnesses should be thoroughly prepared as to their total involvement in this case. Accused's civilian counsel is very experienced in both federal and state criminal matters. On one occasion during her cross-examination of SrA Peelman, she caused

the witness to become confused about the date of her statement to the OSI (Exhibit 9) and admit to something being incorrect when in fact, the witness was correct. This was not a material matter and while not specified in the summary of SrA Peelman's testimony, it is cited to show the need for the thorough preparation of all trial witnesses.

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS NINTH AIR FORCE (TAC)
SHAW AIR FORCE BASE, SOUTH CAROLINA
29152

Y TO
OF: JA 4 FEB 1982

ECT: Advice and recommendations on Court-Martial Charges Against Second Lieutenant Joann C. Newak, 167-38-0425FV, Headquarters, 21st Air Division, Hancock Field, New York

TO: 9AF/CC

I. Preliminary Matters

I have read the attached charges against Second Lieutenant Joann C. Newak, Headquarters Squadron 2lst Air Division, Hancock Field, New York, pursuant to Article 34a, Uniform Code of Military Justice. On 23 October 1981, Lieutenant Colonel Herbert Fotheringham, 2lst Air Division, Hancock Field, New York, preferred four charges alleging variously that the accused attempted to violate a lawful general regulation (Article 80, UCMJ); violated a lawful general regulation (Article 92, UCMJ); used, possessed and transferred marijuana (Article 134, UCMJ); and conduct unbecoming an officer (Article 133, UCMJ). On 31 December 1981, Lieutenant Colonel Fotheringham preferred one Additional Charge alleging sodomy in violation of Article 125, UCMJ. Major Maurice A. Deaver, Jr., 4787 Air Base Group, Duluth International Airport, Minnesota investigated Charges I through IV. He recommended steps be taken to make several key witnesses available and thereafter that the investigation be reopened. On 6 January l982, Lieutenant Colonel Lawrence H. Gingold, 4789 Air Base Group, Hancock Field, New York, investigated Charges I through IV again, and also the additional charge preferred on 31

December 1981. He recommends trial by court-martial of all charges and specifications with the exception of specifications 3 and 4 of Charge IV. He recommends those be dismissed. Colonel John A. Chambers, Commander, 4789th Air Base Group, Hancock Field, New York, concurs with the recommendation of the investigating officer.

2. The Charges and Specifications

a. Charge I alleges three violations of Article 80, UCMJ as follows:

(1) Specification 1 alleges the accused did at North Syracuse, New York, on 6 July 1981, attempt to violate a lawful general regulation by wrongfully transferring a substance which she believed to be amphetamines.

(2) Specification 2 alleges that the accused did at North Syracuse, on 6 July 1981, attempt to violate a lawful general regulation by wrongfully transferring a substance she believed to be amphetamines.

(3) Specification 3 alleges the accused did at Clay, New York, on 10 July 1981 attempt to violate a lawful general regulation by wrongfully transferring a substance which she believed to be amphetamines.

b. Charge II alleges one violation of Article 92, UCMJ.

The specification alleges the accused did, at Clay, New York, between the dates alleged, violate a lawful general regulation by wrongfully having in her possession some amphetamines.

c. Charge III alleges three violations of Article 134, UCMJ as follows:

(1) Specifications 1 alleges the accused did at Clay, New York, between the dates alleged, wrongfully use marijuana.

(2) Specification 2 alleges the accused did at Clay, New York, between the dates alleged, wrongfully possess marijuana.

(3) Specification 3 alleges the accused at Clay, New York, between the dates alleged, wrongfully transfer marijuana.

d. Charge IV alleges four violations of Article 133, UCMJ as follows:

(1) Specification 1 alleges the accused did at Hancock Field, North Syracuse, New York, on 17 June 1981 engage in conduct unbecoming an officer and a gentleman by wrongfully suggesting to an enlisted female person, that such person was bisexual, kissing her on the check and saying "I love you."

(2) Specification 2 alleges the accused did at Hancock Field, North Syracuse, New York on 25 June 1981, engage in conduct unbecoming an officer and a gentleman by wrongfully admitting to an enlisted female person that she (the accused) was having a homosexual relationship with another enlisted female.

(3) Specification 3 alleges the accused did at Clay, New York on 1 June 1981, engage in conduct unbecoming an officer and a gentleman by wrongfully admitting to a civilian that she (the accused) was having a homosexual relationship with another female.

(4) Specification 4 alleges the accused did at Clay, New York, on 15 July 1981 engage in conduct

unbecoming an officer and a gentleman by wrongfully kissing, hugging and holding hands with an enlisted female person.

e. The Additional Charge alleges three violations of Article 125, UCMJ, as follows:

(1) Specification 1 alleges that the accused did at Clay, New York, on the dates alleged, commit sodomy with Senior Airman Lynne Peelman.

(2) Specification 2 alleges that the accused did at Lexington, Tennessee, on the date alleged, commit sodomy with Senior Airman Lynne Peelman.

(3) Specification 3 alleges that the accused did at Lexington, Tennessee, on the date alleged, commit sodomy with Senior Airman Lynne Peelman.

3. The Evidence

Miss Julie Michalzuk has shared an apartment with the accused in Clay, New York since December 1980. She has seen the accused bring marijuana into the residence in a small sandwich bag. The accused has also had friends over to smoke marijuana. Sometimes the accused smoked marijuana alone. Miss Michalzuk observed her smoke marijuana at least once a week. In addition she also saw the accused in possession of amphetamines. She overheard the accused say that she took the solid black capsules. Around the first of June 1981 the accused told Miss Michalzuk that she was having a sexual relationship with another girl. The girl (apparently Lynne Peelman) would stay with the accused about five nights a week.

On 27 May 1981 after a softball game at Hancock Field, New York, Senior Airman Peelman and the accused decided to get some beer and drive around. The drive

subsequently ended at the accused apartment in Clay, New York. Peelman and the accused went to the basement of the apartment and had another drink. The accused produced some marijuana. Both she and Peelman smoked the marijuana. Peelman had the expected reaction from smoking the substance. During the course of the evening the accused told Peelman, "I have these feelings for you, and would like to give you a kiss." Peelman replied "Would you really?", at which point the accused kissed her. They then caressed and kissed some more. The evening ended when the accused realized that she had to go to work.

The following day Peelman again went to the accused's apartment. The accused said she would like to have a sexual relationship with Airman Peelman. They agreed to see each other.

During the succeeding months they carried on a homosexual relationship. Peelman estimates these acts occurred on approximately 50 separate occasions, from the end of May 1981 until August 1981. The acts that occurred at the accused residence entailed the accused putting her fingers and her mouth into Peelman's vagina. Peelman reciprocated. There was also kissing, caressing and sexual stimulation during the homosexual acts.

On 4 July 1981 the accused and Peelman visited the accused mother's home in Vandling, Pennsylvania. In the accused little sister's room, they engaged in a homosexual act while at the residence. They caressed, kissed and had oral-genital sex. The accused felt the area of Peelman's vagina with her hands and mouth. The accused put her fingers and mouth into Peelman's vagina. Peelman did the same to the accused.

In early August 1981 the accused accompanied Peelman to her home in Lexington, Tennessee. They stayed there about 10 days to 2 weeks. While there they engaged in homosexual acts. During the acts the accused would put her fingers and mouth in Peelman's vagina. Peelman would perform the same acts on the accused.

During their relationship the accused also furnished marijuana to Peelman. Peelman estimates since the spring of 1981, she had visited the accused's apartment several times a week until late summer. Peelman and the accused used marijuana some 30 times during this period, at the Clay, New York apartment. In addition to the marijuana gave Peelman a "black beauty", (slang term for amphetamines). The accused also told Peelman she bought "speed" from an Airman Pat Whelhan. Peelman has also been present at the apartment during a party where both marijuana and "speed" (amphetamines) were present.

On 17 June 1981 while at a softball field at Hancock Field, New York, the accused approached Airman First Class Donna L. Ryan. She told Ryan she knew why Ryan had recently gotten a driving-under-the-influence violation. The accused indicated that it was because Ryan was "bi" (slang term indicating a person who engages in sexual relationships with both sexes). Ryan pretended not to understand. Later, the accused approached Ryan, kissed her on the neck and said "I love you."

On 6 July 1981 while at a softball field at Hancock Field, New York, the accused invited Airman First Class Ryan to a local bar. At the invitation of Ryan, an Airman First Class John Liles also came alone. Just prior to going into a local bar the accused took four pills out of a compartment of her car. The accused said, "Here is some speed." She gave one to Ryan, one to Liles and she took one. The accused split the fourth pill with Liles. John Liles also recalls the accused asking, "If they wanted some speed", just prior to going into the nightclub. He remembers the accused took one and a half tablets. He took one and believes Ryan only took half a tablet. Airman Ryan turned over her pill to the OSI. The tablet was subsequently chemically analyzed and revealed the presence of no controlled substance.

On 9 July 1981 while at the ball park at Hancock Field, the accused engaged in a conversation with Ryan concerning the accused's relationship with Peelman. The

accused explained their first encounter when she had kissed Airman Peelman. Later than evening Ryan and the accused took a drive around base. During the drive the accused admitted to Ryan, that she and Peelman were having a sexual relationship. Ryan inquired what went on. The accused replied that it was something like a "girl and a guy with less parts." "She (referring to Peelman) has versatile erect fingers."

On 10 July 1981 Ryan went to the accused's apartment for dinner. The accused and Ryan picked up Airman John Liles. They returned to the accused's apartment. That evening Liles and the accused smoked marijuana. Marijuana was offered to Ryan and passed back and forth between the people that were present. Ryan obtained a sample of the substance, which subsequently proved to be marijuana by chemical analysis. Also present that evening was Peelman, the accused's two civilian roommates and Airman Whelhan. The accused produced a bag of marijuana and passed it around. He remembers the accused smoked the substance along with the others present. During the evening the accused took Liles and Ryan upstairs to her bedroom and said, "Here is something to keep you awake." The accused then gave both he and Ryan two tablets each.

4. Legal Analysis

a. Jurisdiction

The investigation was conducted in substantial compliance with Article 32, UCMJ. The offenses which are recommended be tried by general court-martial occurred in the accused's current term of service. All of the offenses with the exception of Specifications 1 and 2 of Charge IV and Specifications 2 and 3 of the Additional Charges were committed near Hancock Field, New York, a United States military installation. Specification 1 and 2 of the Additional Charge were committed in Pennsylvania and Tennessee

respectively. All of the offenses were committed in the presence of active duly enlisted members or civilians that were aware of the accused's military status as an officer. Charge IV and the Specification thereunder are offenses not commonly prosecuted in civilian courts. All of the offenses impair the accused's ability to function effectively as an officer at Hancock Field, New York. The conduct represents a threat to the military community, a flouting of military authority and a disgrace to the image of a United States officer corps. Thus, under the circumstances the military has an overriding interest in the prosecution of these offenses which cannot be adequately vindicated in a civilian court. Exercise of court-martial jurisdiction is appropriate. O'Callahan v. Parker, 395 US 258 (1969); Redford v. Commandant, 401 US 355 (1971); United States v. Alef, 3 M.J. 414 (CMA 1977); United States v. Trottier, 9 M.J. 337 (CMA 1980), United States v. Brown, 8 M.J. 501 (AFCMR 1979) and United States v. Coronado, 11 J.J. 522 (AFCMR 1981).

b. The Elements

(1) As to Specification 1, 2 and 3 of Charge I - Attempt

That at the time and place alleged the accused attempted to violate a lawful general regulation.

The elements of the attempted offense are:

(a) That there was in effect a certain lawful general regulation; and

(b) That the accused had a duty to obey such a regulation; and

(c) That at the time and place alleged the accused violated such general regulation.

(2) As to the Specification of Charge II - Violation of a Lawful General Regulation

(a) That there was in effect a certain lawful general regulation; and

(b) That the accused had a duty to obey such a regulation; and

(c) That at the time and place alleged the accused violated such general regulation.

(3) As to Specification 1 of Charge III - Use of Marijuana

(a) That at the time and place alleged the accused used marijuana;

(b) That such use was wrongful; and

(c) That under the circumstances the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

(4) As to Specification 2 of Charge III - Possession of marijuana

(a) That at the time and place alleged the accused possessed marijuana;

(b) That such possession was wrongful; and

(c) That under the circumstances the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

(5) As to Specification 3 of Charge III - Transfer of Marijuana

(a) That at the time and place alleged the accused transferred marijuana;

(b) That such transfer was wrongful; and

(c) That under the circumstances the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

(6) As to Specification 1 through 4 of Charge IV - Conduct unbecoming an Officer and a Gentleman

(a) That at the time and place alleged the accused did the acts alleged;

(b) That under the circumstances these acts constitute conduct unbecoming an officer and a gentleman.

(7) As to Specifications 1 through 3 of the Additional Charge - Sodomy

(a) That at the time and place alleged the accused engaged in unnatural carnal copulation with the person alleged.

c. The Proof

(1) As to Specifications 1 through 3 of Charge I - Attempt

An act, done with the specific intent to commit an offense, amount to more than mere preparation and tending, even though failing, to effect it's commission, is an attempt to commit an offense. An accused may be guilty of an attempt even though the commission of the intended offense was impossible, because of the unexpected intervening circumstances or even though the consummation of the intended offense was prevented by mistake on the part of the accused. An accused may be guilty of an attempt to commit an offense, when she engages in conduct that would constitute a crime, if the intended facts were as she believed them to be. Paragraph 159, Manual for Courts-Martial 1969 (Rev). It is not essential that the offense be proved,only that the accused intended to commit it, and took steps beyond mere preparation. AFM 111-2, paragraph 3-2a.

The evidence establishes that the accused attempted to violate a lawful general regulation, Air Force Regulation 30-2, paragraph 3-4, when she used, possessed and transferred

what she though was "speed". "Speed" is a common term used to refer to amphetamines. Testimony of Airman First Class Donna L. Ryan and Airman First Class John A. Liles clearly establish all the elements of the Specifications of Charge I. (United States v. Giles, 42 CMR 960 (AFCMR 1970)).

(2) As to the Specification of Charge II - Violation of a Lawful General Regulation

The evidence to support this Specification comes from Julie Michalzuk, and Airman Peelman. Mrs. Michalzuk's sworn statement dated 4 September 1981, states "I have also seen in her possession a few amphetamines. They were solid black capsules. I know she had taken them because I overheard her telling someone that I knew." The accused told Peelman that she bought "speed" from Pat Whelhan. Peelman acknowledges receiving "speed" from the accused. Peelman also testified that the accused said "She had purchased some black beauties in Pennsylvania." She showed these to Airman Peelman. Peelman indicated the term "Black Beauty" is a slang word for amphetamines. They both took these on occasion at the accused's residence in Clay, New York.

The Specification requires the government to show that Air Force Regulation 30-2 was a lawful general regulation in effect and the accused has a duty to obey such regulation. Simple introduction of the regulation into evidence will establish these elements. The third element requires the government to show that at the time and place alleged the accused violated the regulation by possessing amphetamines. None of the witnesses indicated a date when they saw the accused in possession of the alleged amphetamines. However, Mrs. Michalzuk and Peelman only had contact with the accused during the period alleged in the Specification (15 December 1980 - 1 September 1981). Therefore, it can be assumed that they observed the

possession during this period. Both indicated that the possession took place at Clay, New York as alleged.

The proof, however, the pills that Michalzuk and Peelman saw were actually amphetamines depend on their ability to identify drugs. Michalzuk does not make any statements concerning her qualifications to identify drugs. Peelman, however, indicates she took one the Black Beauties and it was very strong.

In my opinion there is sufficient evidence to establish each element of the offense. However, at a minimum there is sufficient evidence to establish an attempt by the accused assuming the fact finders do not believe that the accused actually possessed amphetamine. The posture of the evidence indicates that the accused believed the "Black Beauties" were amphetamines from statements that were made to the witnesses.

(3) As to Charge III and Specifications 1, 2 and 3

These Specifications allege the accused used, possessed and transferred marijuana. The Specifications all share the common element that the accused's act was wrongful. Additionally each Specification requires proof that under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces. Use, possession and transfer of marijuana may be inferred to be wrong unless the contrary appears (for example, if the accused had a prescription for the drug). There is no evidence in the investigation that the accused was authorized to use, possess or transfer marijuana. "To the prejudice of good order and discipline," refers only to acts directly prejudicial to good order and discipline and not the acts which are prejudicial only in a remote or indirect sense. The element contemplates cases in which the prejudice is reasonably direct and palpable. Para 213b,

Manual for Courts-Martial 1969 (Rev). Discredit means "to injure the reputation of". Discreditable conduct is conduct which has a tendency to bring the service into disrepute or which tends to lower it in the public esteem.

In my opinion the use, possession and transfer of marijuana by the accused was wrongful; to the prejudice of good order and discipline; and discrediting to the armed forces. This is especially true as it was with or in the presence of enlisted personnel.

Turning to the individual acts, the evidence to support the Specification comes from the testimony of Senior Airman Donna L. Ryan, Julie Michalzuk, Airman First Class John Liles and Airman First Class Lynne Peelman. Without recounting the specific testimony of each witness, suffice to say that each can say they saw the accused use, possess and transfer marijuana during 15 December 1980 to 1 September 1981 at Clay, New York on numerous occasions. Several of the witnesses actually used the substance with the accused and their testimony will suffice to establish it as marijuana. On one occasion Senior Airman Ryan obtained a sample of the substances which subsequently proved to marijuana after chemical analysis.

Specification 3 of Charge III warrants comment. Specification 3 alleges the transfer of marijuana. Transfer means simply any kind of disposition resulting in a change of possession. Simply passing a marijuana cigarette to another will satisfy this definition. In the instant case there is sufficient evidence to show the accused on numerous occasions, passes marijuana to others.

(4) As to Charge IV and Specifications 1, 2, 3 and 4 - Conduct unbecoming an Officer and Gentleman

"Conduct violative of this article is ...action or behavior in an unofficial or private capacity which is dishonoring or disgracing the individual personally, seriously compromised his standing as an officer. This article contemplates conduct

by a commissioned officer ...which, taking all the circumstances into consideration, is thus compromising." Paragraph 212, MCM 1969 (Rev.). "...(T)he act which forms the basis of the charge must have a double significance in effect. Though it need not amount to a crime, it must offend so seriously against the law, justice, morality or decorum as to expose to disgrace, socially or as a man, the offender and at the same time must be of such a nature or committed under such circumstances as to bring the dishonor or disrepute upon the military profession which he represents." Parker v. Levy, 417 US 753, 94 S.Ct. 2547, 2560, 41 LEd 2nd 439 (1974); United States v Coronado, 11 M.J. 522 (AFCMR 1981).

Specification 1 alleges the accused wrongfully suggested to an enlisted female person that the person was bisexual. Additionally, the accused without authority kissed the enlisted female on the check and said, "I love you". According to Airman First Class Ryan this act occurred at Hancock Field, New York on 17 June 1981.

Initially, I note Airman Ryan's statement indicates that the accused kissed her on the neck and not the check. I recommend the Specification be amended to so reflect. Ryan's testimony will establish each factual element of this offense. Additionally, considering the purpose and intent of Article 133, UCMJ, it is my opinion that the acts were conduct unbecoming an officer. The kiss occurred in a public place. The victim was an enlisted person of the same service. The suggestion and nature of the conversation was not proper between an officer and a subordinate.

Article 133, UCMJ, is not set out in the table of maximum punishments. Paragraph 127, MCM 1969 (Rev.). Punishment for violation of Article 133, UCMJ is determined by equating conduct to another Article that adequately describes the accused's acts. It is my opinion the totality of the accused's acts constitute indecent, insulting or obscene language communicated to a female of age 16 years or older. This offense carries a penalty of dismissal, one year

confinement at hard labor, forfeiture of all pay and allowances.

The investigating officer recommended Specifications 3 and 4 not be referred to the court, because of the nonavailability of a witness and the lack of evidence. I concur in this recommendation. Additionally, I recommend that Specification 2 not be referred to court. Although admissions made by the accused concerning the alleged homosexual relationship with Peelman will be admissible to support the sodomy charge, it is not totally clear these admissions violated Article 133, UCMJ. Additionally, it is not necessary for the accused to be charged with every violation of the UCMJ, rather that the charges should fairly and accurately set out the pattern of major misconduct.

(5) Additional charge and Specifications 1, 2 and 3 - Sodomy

Sodomy is the engaging in unnatural carnal copulation, either with another person of the same or opposite sex. It is unnatural carnal copulation for a person to take into his or her mouth the sexual organ of another person; or to place his or her sexual organ in the mouth of another. Testimony of Senior Airman Peelman supports each Specification in all particulars. In my opinion her testimony will establish the date, time, place and specific acts by the accused. Further these acts constitute sodomy in violation of Article 125, UCMJ.

5. Personal Data Pertaining to the Accused

a. Age:
24
b. Marital Status:
Single
c. Date of current service:
29 November 1979

d. Prior Service:
29 August 1979 - November 1979
e. Education:
16 years
f. AFSC:
7524, Chief Operations and Training

g. Character of Service:
Good
h. Efficiency of service:
Good.
i. Awards and Decorations:
None

6. Pretrial Restraint

The accused has not now and has not been confined as a result of the charges.

7. Previous Convictions and Prior Punishments Under Article 15, UCMJ

The accused has not previously been convicted by court-martial or punished under Article 15, UCMJ.

8. Selection of Court Members

If you refer this case to trial, as convening authority, it is incumbent upon you to select and appoint the participants and members of the court-marital. The Uniform Code of Military Justice requires that you select such individuals as, in your opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament. When it can be avoided, no member you select should be junior in rank or grade to the accused. You may not detail any person who has been the accuser, a witness for the prosecution, investigating

officer or counsel in this case. Subject to these limitations you should endeavor to obtain, to the extent possible, an average cross-section of the command population. In this regard you may not exclude any person or group of persons on the basis of race, color, national origin, religion or sex or solely on the basis of rank or age.

9. Maximum Punishment

The maximum punishment for the recommended Charges and Specifications is to be dismissed from the Air Force, to be confined at hard labor for 39 years and to forfeit all pay and allowances.

10. Conclusions and Recommendations

Consistent with the above I recommend that Specifications 2, 3 and 4 of Charge IV not be referred to trial. I recommend that the remaining Charges and Specifications be referred to trial. I recommend that Specification 1 of Charge IV be amended by deleting the word check and substituting the word neck. Additionally the investigating officer recommended Charge II and the Specification be amended by deleting 15 December 1980 and substituting 1 June 1981; Charge III and Specifications 1, 2 and 3 be amended by deleting 15 December 1980 and substituting 27 May 1981. I do not concur in these amendments. There is some evidence in the investigation that wrongful acts occurred prior to the amended period recommended by the investigating officer. Therefore, at this point I recommend these amendments not be approved. Should the evidence not conform to the dates alleged in these Specifications the trial counsel should be permitted to make the appropriate amendments. In my opinion the evidence will establish the accused committed the offenses alleged in the Charges and Specifications recommended for trial by general court-marital. The Specifications properly

allege offenses under the Uniform Code of Military Justice and are properly drafted, as amended. The Charges are serious and can properly be resolved only by general court-martial. In so concluding, I have considered the accused's military record. Thus, I recommend the Charges and Specifications as amended be referred to trial by general court-martial.

/s/RONNIE D. COMPTON, Captain, USAF
Assistant Staff Judge Advocate

I have read the charge sheet, the Article 32 investigation, the allied papers, and the foregoing advice. I concur with the advice and the opinions and recommendations made therein. If you determine that trial by general court-marital is appropriate, I will cause special orders to be published convening the court-martial, complete and authenticate for you the indorsement on the third page of the charge sheet in the prescribed manner, and transmit the charge sheet, the Article 32 investigation, the allied papers, and this advice to the trial counsel of the court.

ROBERT L. BRIDGE, Lt Colonel, USAF
Acting Staff Judge Advocate

APPROVED.

LARRY O WELCH
Lieutenant General, USAF
Commander

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS NINTH AIR FORCE (TAC)
SHAW AIR FORCE BASE,
SOUTH CAROLINA 29152

SPECIAL ORDER
AB-9

6 February 1982

A General Court-Marital is hereby convened. It may proceed at Hancock Field, New York, to try such persons as may be properly be brought before it. The court will be constituted as follows:

MILITARY JUDGE

LT COL ROBERT H. LEONARD, 384-42-5365, HQ USAF Trial Judiciary, First Circuit, Bolling AFB DC, certified, designated and assigned in accordance with Art 26(b) and (c) (JAGO 1, 1 Jan 82), and previously sworn in accordance with Art 42(a), a Military Judge designated for detail by TJAG.

MEMBERS

[Names of members omitted]

COUNSEL

MAJ WILLIAM C. HENRY, 052-38-6789, HQ USAF Judiciary, First Circuit, Bolling AFB DC, TRIAL COUNSEL, certified in accordance with Art 27(b) (JAGO 1, 1 Jan 82), and previously sworn in accordance with article 42(a), and designated for detail by TJAG.

CAPT WILLIAM A. LYELL, JR., 461-82-6679, HQ 4789 ABG (TAC), Hancock Field, NY, ASST TRIAL COUNSEL,

designated Judge Advocate (JAGO 1, 1 Jan 82), not certified in accordance with Art 27 (b).

CAPT DAVID F. EATON, 506-78-6540, HQ USAF Judiciary Area Defense Counsel, Plattsburgh AFB NY, DEFENSE COUNSEL, certified in accordance with Art 27(b) (JAGO 1, 1 Jan 82) and previously sworn in accordance with Art 42 (a), and designated for detail by TJAG.

LARRY D. WELCH,
Lt General, USAF
Commander

/s/EDWARD N. PASLICK
Major, USAF
Asst Chief of Administration

REQUEST FOR TRIAL
BEFORE MILITARY JUDGE ALONE
(ART. 16, UCMJ)

UNITED STATE OF AMERICA
V.

Second Lieutenant Joann C. Newak

I have been informed that Lt Colonel Robert H. Leonard is the military judge detailed to the court-martial to which the charges and specifications pending against me have been referred for trial. After consulting with my defense counsel, I hereby request that the court be composed of the military judge alone. I make this request will full knowledge of my right to be tried by a court-martial composed of (commissioned) [1] officers (XXXXX)[2].

(Dated)
10 March 1982

(Signature of Accused)
/s/Joann C. Newak

(Typed Name and Grade)
Joann C. Newak
2Lt, USAF

Prior to the signing of the foregoing request, I advised the above accused fully of his right to trial before a court-martial composed of (commissioned) [1] officers. (XXXXX)[2].

(Dated)
10 March 1982

(Signature of Defense Counsel)

/s/Faith A Seidenberg

(Typed name and Rank)
Faith A. Seidenberg
Civilian Defense Counsel

Argument is (not) requested.
(Dated)
10 March 1982

(Signature of Trial Counsel)
/s/William C. Henry

(Type name and Rank)
William C. Henry
Major, USAF

The foregoing request for trial before me alone is hereby:
X Approved
Disapproved

(Dated)
10 March 1982

(Signature of Military Judge)
/s/Robert H. Leonard

(Typed Name and Rank)
Robert H. Leonard
Lt Colonel, USAF

[1] Delete when the accused is a warrant officer or enlisted member.

[2] Delete when the accused is a commissioned officer or warrant officer.

REPORT OF RESULT OF TRIAL

Date 11 Mar 82

To: (Address to record commander of accused)

21 ADS

NOTIFICATION UNDER MCM 1969 (REV.), PARA **e, IS HEREBY GIVEN IN THE CASE OF:

Last Name - first name - middle initial

NEWAK, JOANN C.

Grade

0-1

SSSN

167-38-0452

Organization

21st Air Defense Squadron

TYPE OF COURT

X General

X Judge alone

SUMMARY OF CHARGES, SPECIFICATIONS, PLEAS AND FINDINGS

UMCJ Article 80
Gist of offense — Attempt to violate a lawful general regula.
Pleas Not guilty
Findings Guilty

UMCJ Article 92
Gist of offense — Did violate a lawful general regulation
Pleas Not guilty
Findings Guilty

UMCJ Article 134
Gist of offense — Use, possess, transfer marijuana
Pleas Not Guilty
Findings Guilty

UMCJ Article 133

Gist of offense Conduct unbecoming an officer
Pleas Not Guilty
Findings Guilty

UMCJ Article 125
Gist of offense Commit Sodomy
Pleas Not Guilty
Findings Guilty

Sentence
To a dismissal
Forfeiture of all pay and allowances
Confinement at hard labor for seven years

Date sentence adjudged
11 March 1982
Distribution (Prescribed by convening authority)
4789/CC
4789/DP
4789/ACF
9AF/JA
4789/JA
416CSG/SP

CHECK ONE
x trial counsel
summary court officer

Appointed by:
SO AB-9
Dated
6 Feb 82
Headquarters
9AF

Typed name and grade
WILLIAM A. LYELL, Jr. Capt, USAF
Assistant Trial Counsel
/s/Willaim A. Lyell, Jr.

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS NINTH AIR FORCE (TAC)
SHAW AIR FORCE BASE, S C 29152

JA

12 APR 1982

Substitution of General Court-Martial Convening Authority - U.S. v Newak

12AF/JA

Headquarters Tactical Air Command has designated your headquarters as the General Courts-Martial Convening Authority in subject case. On 17 November 1981, the Commander, Ninth Air Force, granted immunity to Senior Airman Lynn E. Peelman and Airman John A. Liles in order to secure their testimony against Second Lieutenant Newak. The immunity grant was requested by the 4789 ABG/JA, Hancock Field, New York, with the concurrence of the SPCMCA. Lieutenant Newak was subsequently tried by General Court-Martial; Airman Peelman and Airman Liles testified for the government. The case resulted in a conviction of the accused. Under the circumstances, 9AF/CC is disqualified from taking action in subject case.

FOR THE COMMANDER

/s/DONALD B. STRICKLAND,
Colonel, USAF
Staff Judge Advocate

20 April 1982

CERTIFICATE OF CORRECTION

UNITED STATES

v

NEWAK, JOANN C.
167-38-04522

The record of trial in the above case, which was tried by the General court-martial convened by Special Order AB-9, HQ 9AF, dated 6 February 1982, as amended by Special Order AB-23, HQ 9AF, dated 4 March 1982, at Hancock Field, New York on 10 and 11 March 1982, is corrected by:

1. Inserting the First Specification of Charge III, on page 7, as follows:

Specification 1: In that SECOND LIEUTENANT JOANN C. NEWAK, United States Air Force, 21st Air Division, did, at Clay, New York, on numerous occasions, from on or about 15 December 1980, to on or about 1 September 1981, wrongfully use marijuana.

This specification was omitted by error during typing of the record.

2. Changing what is now designated as Specification 1 of Charge III, on page 7, to the designation of Specification 2. No change to the text of Specification 2 is required.

This correction is made due to an administrative oversight during preparation of the record.

/s/ROBERT H. LEONARD, Lt. Colonel, USAF
Military Judge
Bolling AFB, DC 20332

STAFF JUDGE ADVOCATE'S REVIEW
OF TRIAL BY COURT-MARTIAL

X General
MJ Alone

1. Date of Review
06 May 1982

2. Date of Trial:
10 & 11 March 1982

3. To:
12 AF/CC

4. Place of Trial:
Hancock Field, New York

The attached record of trial by court-martial has been referred to me in accordance with the provisions of the UCMJ and MCM xxxx 1969 (Revised). I have examined the record and submit herewith my review with opinions, recommendations and reasons therefore.

ACCUSED

5. United States v.
Newak, Joann C.

6. S SAN
167-38-0452

7. Grade
2LT 0-1

8. AFSC
07524

9. Character of service (Prior to charges)
SATISFACTORY

10. Age at time of earliest offense
-23-

11. Married
Never

12. AFQT

N/A

13. AQE

N/A

14. Organization

21st Air Division

15. No. School years completed

16

16. Airman on court

No

17. Civilian counsel

Yes

18. No. Previous convictions

-0-

19. No. of article 15 punishments

-0-

20. Psychiatric report

No

PRETRIAL PAY DATA

21. Basic pay

$1,099.80

22. SEA or Foreign duty

-0-

23. Total

$1,099.80

24. Class Q

-0-

25. No. of dependents

None

RECORD OF SERVICE

26. Initial date of current service

29 November 1979

27. Total creditable active service to date of sentence

30 months

28. Term of current service

Four years

DATA AS TO PRETRIAL RESTRAINT

29. Nature and date of any restraint imposed
None
30. Location
N/A
31. Total days
N/A

PLEAS, FINDINGS AND SENTENCE

32. Sentence adjudged
Dismissal, CHLx7 Yrs, TF
33. Date Adjudged
11 Mar 1982
34. Sentence approved by C/A (special)
N/A
35. Maximum sentence for offenses sustained upon review
Dismissal, CHLx7 yrs, TF
36. Sentence recommended
Dismissal, CHLx6 yrs, TF
37. Place of confinement
USDB, Fort Leavenworth, Kansas

38. SYNOPSIS OF CHGS AND SPECS

CH I: Viol of UCMJ, Art 80
Spec 1: At N.Syracuse,NY, o/a 6 Jul 81, attempt to violate para 3-4, AFR 30-2, dated 22 Jun 81, by transferring what she believed to be amphetamines.
Spec 2: At N.Syracuse, NY, o/a 6 Jul 81, attempt to violate para 3-4, AFR 30-2, dated 22 Jun 81, by using what she believed to be amphetamines.
Spec 3: At Clay, NY, o/a 10 Jun 81, attempt to violate para 3-4, AFR

30-2, dated 22 Jun 81, by transferring what she believed to be amphetamines.

CH II: Viol of UCMJ, Art 92
Spec: At Clay, NY, from o/a 15 Dec 80 to o/a 1 Sep 81 violate para 3-4, AFR 30-2, dated 22 Jun 81, and/or para 4-4, AFR 30-2, dated 8 Nov 76 by possessing amphetamines.

CH III: Viol of UCMJ, Art 134
Spec 1: At Clay, NY, on numerous occasions from o/a 15 Dec 80 to 1 Sep 81, wrongfully use marijuana.
Spec 2: At Clay, NY, on numerous occasions from o/a 15 Dec 80 to o/a 1 Sep 81, wrongfully possess marijuana.
Spec 3: At Clay, NY, on numerous occasions from o/a 15 Dec 80 to 1 Sep 81, wrongfully transfer marijuana.

CH IV: Viol of UCMJ, Art 133
Spec: At Hancock F1d, NY, o/a 17 Jun 81 wrongfully suggest to an enlisted female that she was bisexual and without authority kiss the enlisted female on the neck and say, "I love you."

ADD CH: Viol of UCMJ, Art 125

Spec 1: At Clay, NY, on numerous occasions from o/a 27 May 81 to o/a 1 Sep 81, commit sodomy with SrA Lynne E. Peelman.
Spec 2: At Vandling, PA, o/a 6 Jul 81 commit sodomy with SrA Lynne E. Peelman.
Spec 3: At Lexington, TN, during Aug 81, commit sodomy with SrA Lynne E. Peelman.

39. PLEAS

CH I: NG
Spec 1: NG
Spec 2: NG
Spec 3: NG

CH II: NG
Spec: NG

CH III: NG
Spec 1: NG
Spec 2: NG
Spec 3: NG

CH IV: NG
Spec: NG

ADD CH: NG
Spec 1: NG
Spec 2: NG
Spec 3: NG

40. FINDINGS

CH I: G
Spec 1: G
Spec 2: G
Spec 3: G

CH II: G
Spec: G

CH III: G
Spec 1: G
Spec 2: G
Spec 3: G

CH IV: G
Spec: G

ADD CH: G
Spec 1: G
Spec 2: G
Spec 3: G

41. APPROVAL RECOMMENDED

CH I: Yes
Spec 1: No
Spec 2: No
Spec 3: Yes

CH II: G of LIO of Article 80
Spec: G of LIO of attempted poseession of amphetamine

CH III: Yes
Spec 1: Yes
Spec 2: Yes

Spec 3: Yes

CH IV: Yes
Spec: Yes

ADD CH: Yes
Spec 1: Yes
Spec 2: Yes
Spec 3: Yes

42. PRELIMINARY MATTERS

The accused was tried by general court-martial at Hancock Field, New York, on 10 and 11 March 1982 upon the charges and specifications reflected above. The court was convened by the Commander, Ninth Air Force. Airman John A. Liles and Senior Airman Lynne E. Peelman, witnesses at the accused's trial, testified under grants of immunity issued by the general court-martial convening authority. The testimony of witnesses testifying pursuant to grants of immunity disqualifies the general court-martial convening authority who issued the grants of immunity from taking post-trial action in this case. United States v. White, 10 USCMA 63, 27 CMR 137 (1958). Pursuant to the provisions of AFM 111-1, Paragraph 7-22, Headquarters Tactical Air Command has designated you as the General Court-Martial Convening Authority to take post-trial action in this case.

43. EVIDENCE BEFORE FINDINGS

A For the prosecution

Airman First Class Donna L. Ryan started working in May or June 1981 as an AFOSI undercover source of information (R.7l, 104, Def Ex A). On 17 June 1981, at a softball game on Hancock Field, New York, the

accused placed her arm around Airman Ryan and stated Airman Ryan received a driving while intoxicated citation because Airman Ryan was a bisexual. Shortly thereafter, while trying to convince Airman Ryan to go to a "queer bar," the accused put her arm around Airman Ryan, kissed Airman Ryan on the neck, and said she loved her (R.72-3,75). At this time the accused and Airman Ryan were casual acquaintances and not friends. Airman Ryan considered the accused's actions and remarks offensive (R.90).

On 6 July 1981, Airman Ryan accompanied the accused and Airman John Liles, from Hancock Field, New York, to various bars in North Syracuse, New York. One of the bars they visited was the Rock Odyssey which is also known as the Video Two and Video Eleven (R.73,90). Prior to entering this bar, the accused produced some pills which she represented to be "speed" or "speckled eggs" from her auto console. The accused gave one pill to Airman Ryan, one to Airman Liles, broke another in two, gave half to Airman Liles and then swallowed a fourth tablet and half of the broken tablet (R.74). Airman Ryan placed the tablet she was given in her pocket and later provided it to AFOSI (R.74,l04). Speed is a street name for amphetamines (R.90).

On 10 July 1981, Airman Ryan went to the accused's offbase quarters in Clay, New York, at the accused's invitation for dinner (R.76,93). After dinner the accused produced a bag of marijuana from under the dresser in her bedroom and pills similar to those she had provided on 6 July 1981. The accused transferred two of the pills to Ryan and two to Liles. Airman Ryan put the pills given to her in her pocket and later provided them to AFOSI (R.77-9,l04). The accused then prepared four or five "joints" from the marijuana which were smoked by the accused, Liles, Senior Airman Lynne Peelman, the accused's civilian roommates, and others present at the house (R.77,l33). Airman Ryan picked up three of the "roach" butts which she later released to AFOSI (R.78,l04).

During the period December 1980 through October 1981, Julie Michalzuk shared rental of a house in Clay, New York, with the accused. During this period she observed the accused in possession of and using marijuana in the house on a number of instances (R.92-3). She also observed the accused in possession of two or three black pills (R.94). During the period between May and September 1981, Airman Peelman saw the accused in possession of black pills which the accused identified as "black beauties" or "speed." She received some of these from the accused and after taking one experienced a "supersonic" effect (R.131-2). The accused and Airman Peelman believed both the speckled pills and the black pills to be amphetamines (R.130).

The pills received by Airman Ryan on 6 and 10 July 1981 after being released to AFOSI were analyzed and found to contain no controlled substance (R.105, Pros Ex 1). The cigarette butts released to AFOSI by Airman Ryan following 10 July 1981 were found to contain marijuana (R.105, Pros Ex 1).

In May 1981, Airman Peelman met the accused who she knew to be an officer assigned to Hancock Field, New York. They are assigned to the same unit (R.126). At the accused's invitation, Airman Peelman accompanied the accused to her quarters in Clay, New York, where they drank beer, smoked marijuana, and engaged in petting and caressing one another (R.127-8). Following this incident, Airman Peelman drove the accused to work at Hancock Field (R.129). From this incident in mid-May 1981 until midsummer 1981, the accused and Airman Peelman smoked marijuana supplied by the accused on numerous instances at the accused's quarters (R.129-130). During this period a homosexual relationship developed between the accused and Airman Peelman. On numerous occasions Airman Peelman spent the night at the accused's quarters in Clay, New York. On the Fourth of July weekend in 1981, the accused and Airman Peelman visited the accused's home in Vandling, Pennsylvania. In August 1981, the accused and

Airman Peelman visited Airman Peelman's home in Lexington, Tennessee. On numerous instances at the accused's quarters in Clay, New York, and while at Vandling, Pennsylvania, and Lexington, Tennessee, the accused and Airman Peelman engaged in homosexual activity which included mutual oral-genital contact and stimulation (R.133-6). The accused orally acknowledged this homosexual relationship with Airman Peelman to Airman Ryan (R.76).

B. For the Defense

Airman Ryan has suffered from a problem of excessive use of alcohol and prior to meeting the accused had entered herself into the Social Actions Alcohol Rehabilitation Program (R.87). On the night of 6 July 1981 when she went "bar hopping" with the accused and Airman Liles, Airman Ryan consumed seven to nine drinks (R.84). Airman Ryan smoked marijuana while in high school, before coming into the Air Force but has not smoked since being in the Air Force (R.89).

44. ANALYSIS OF FINDINGS

A. The Elements

(1) Charge I, Specification 1

(a) That at North Syracuse, New York, on or about 6 July 1981, the accused did a certain overt act; that is, wrongfully transferred a substance that she believed to be amphetamines;

(b) That the act was done with the specific intent to commit the offense of violation of paragraph 3-4, AFR 30-2, dated 22 June 1981, by transferring amphetamines;

(c) That the act amounted to more than mere preparations; that is, it was a direct movement

towards the commission of the intended offense; and

(d) That the act apparently tended to effect the commission of the intended offense; that is, the act apparently would have resulted in the actual commission of the intended offense except for circumstances unknown to the accused which would have prevented the completion of that intended offense.

With regard to the requirement that an overt act be done with the specific intent of the accused to commit the offense alleged, it need not be proved that the accused actually committed that offense. However, it must be proved beyond a reasonable doubt that the accused's intent embraced each and every element of that offense. These elements are: That there was in effect a certain lawful regulation in the following terms: paragraph 3-4, AFR 30-2, dated 22 June 1981, prohibiting the transfer of a controlled substance to include amphetamines; (2) that the accused had a duty to obey such regulation; and (3) that at the time and place alleged, the accused failed to obey this lawful general regulation by transferring amphetamines.

(2) Charge I, Specification 2

(a) That at North Syracuse, New York, on or about 6 July 1981, the accused did a certain overt act; that is, used a substance she believed to be amphetamines;

(b) That the act was done with the specific intent to commit the offense of violation of paragraph 3-4, AFR 30-2, dated 22 June 1981, using amphetamines;

(c) That the act amounted to more than mere preparation; that is, it was a direct movement toward the commission of the intended offenses; and

(d) That the act apparently tended to effect the commission of the intended offense; that is, the act would have resulted in the actual commission of the intended offense except for a circumstance unknown to the accused which prevented the completion of the intended offense.

The elements of the completed offense are: (1) that there was in effect a certain lawful general regulation, to wit: paragraph 3-4, AFR 30-3, dated 22 June 1981, prohibiting the lawful use of controlled substances to include amphetamines; (2) that the accused had a duty to obey such regulation; and (3) that at the time and place alleged, the accused violated this lawful general regulation by using amphetamines.

(3) Charge I, Specification 3

(a) That at Clay, New York, on or about 10 July 1981, the accused did a certain overt act; that is, transferred a substance she believed to be amphetamines;

(b) The act was done with the specific intent to commit the offense of violation of paragraph 3-4, AFR 30-2, dated 22 June 1981, by transferring amphetamines;

(c) That the act amounted to more than mere preparation; that is, it was a direct movement towards the commission of the intended offense; and

(d) That the act apparently tended to effect the commission of the intended offense; that is, the act would have resulted in the actual commission of the intended offense except for circumstances unknown to the accused which prevented the completion of that intended offense.

The elements of the completed offense are: (1) that there was in effect a certain lawful general regulation in the following terms: paragraph 3-4, AFR 30-2, dated 22 June 1981, prohibiting the transfer of controlled substances to include amphetamines; (2) that the accused had a duty to obey such regulations; and (3) that at the time and place alleged, the accused violated this lawful general regulation by transferring amphetamines.

(4) Charge II, Specification

(a) That from on or about 15 December 1980 to on or about 21 June 1981, there was in effect a certain lawful general regulation in the following terms, paragraph 4-4, AFR 30-2, dated 8 November 1976, which provided Air Force members will not possess any dangerous drugs specified in paragraph 4-2b. Paragraph 4-2b includes amphetamines; from on or about 22 June 1981 to on or about 1 September 1981, that there was in effect a certain lawful general regulation in the following terms: paragraph 3-4, AFR 30-2, dated 22 June 1981, providing that military members must not possess any dangerous drugs as specified in paragraph 3-3c(3). Paragraph 3-3c(3) of such regulation defines dangerous drugs to include amphetamines.

(b) That the accused had the duty to obey such regulation/regulations; and

(c) That at Clay, New York, from on or about 15 December 1980 to on or about 1 September 1981, the accused failed to obey this lawful general regulation/regulations by possessing amphetamines.

The elements of the lesser included offense of attempt to violate the regulations in issue are:

(a) That at North Syracuse, New York, on or about 15 December 1980 to on or about 1 September 1981, the accused did a certain overt act; that is, possessed a substance she believed to be amphetamines;

(b) That the act was done with the specific intent to commit the offense of violation of paragraph 3-4, AFR 30-2, dated 22 June 1981, and/or paragraph 4-4, AFR 30-2, dated 8 November 1976, possessing amphetamines;

(c) That the act amounted to more than mere preparation; that is, it was a direct movement toward the commission of the intended offenses; and

(d) That the act apparently tended to

effect the commission of the intended offense; that is, the act would have resulted in the actual commission of the intended offense except for a circumstance unknown to the accused which prevented the completion of the intended offense.

(5) Charge III

(a) That at Clay, New York, on numerous occasions from on or about 15 December 1980 to on or about 1 September 1981, the accused used (Specification 1), possessed (Specification 2), and transferred (Specification 3) marijuana;

(b) That such use, possession, and transfer by the accused was wrongful; and

(c) That under the circumstances the conduct of the accused was to the prejudice of good order and discipline in the Armed Forces or was of a nature to bring discredit upon the Armed Forces.

(6) Charge IV

(a) That at Hancock Field, North Syracuse, New York, on or about 17 June 1981, the accused made a statement to Airman Donna L. Ryan, a female member of the United States Air Force, that Airman Ryan was bisexual and proceeded without authority to kiss Airman Ryan on her neck and make the statement, "I love you;" and

(b) That under the circumstances the accused's conduct was unbecoming an officer and a lady.

(7) Additional Charge

(a) That at Clay, New York, from on or about 27 May 1981 to on or about 1 September 1981 (Specification 1), at Vandling, Pennsylvania, on or about 4 July 1981 (Specification 2), at Lexington, Kentucky, during August 1981 (Specification 3), the accused engaged in

unnatural carnal copulation with Senior Airman Lynne E. Peelman. It is unnatural carnal copulation for a person to take into her mouth the sexual organ of another or to place her sexual organ in the mouth of another.

B. Proof

The testimony of Airman Ryan establishes that on 6 July 1981 at North Syracuse, New York, the accused transferred and used what she represented to be amphetamines. Her testimony further establishes that on 10 July 1981 at Clay, New York, the accused again transferred amphetamines. The testimony of Airman Peelman establishes that both she and the accused believed these pills, which were established by chemical analysis to be caffeine, to have been amphetamines. The testimony of Airman Peelman establishes that during the period 15 December 1980 to 1 September 1981 at Clay, New York, the accused possessed some black capsules which she referred to as "black beauties" and believed to amphetamines. Airman Peelman took one of these pills and experienced a substantially greater reaction from it, than from the pill found by laboratory analysis to be caffeine. She describes her reaction to this pill as being a "supersonic effect." Miss Julie Michalzuk confirms the accused's possession of this black capsule. The testimony of Airman Ryan, Airman Peelman, and Miss Michalzuk establishes that on numerous instances during the period from on or about 15 December 1980 to 1 September 1981, the accused possessed, used, and transferred marijuana at her off-base quarters in Clay, New York.

The testimony of Airman Ryan establishes that on 17 June 1981 at Hancock Field, North Syracuse, New York, the accused stated to Airman Ryan that Airman Ryan was bisexual and that she, the accused, "loved" Airman Ryan. This testimony also establishes that at this time the accused without authority kissed Airman Ryan on the neck. That such actions are wrongful and conduct unbecoming an

officer is established by the casual nature of the relationship between the accused, a female officer and Airman Ryan, a female enlisted woman, by the offense Airman Ryan took the the accused's conduct and by the circumstances of the incident.

The accused's commission of sodomy at Clay, New York, during the period 27 May 1981 to 1 September 1981, at Vandling, Pennsylvania, on or about 6 July 1981, and at Lexington, Tennessee, during August 1981 is established by the testimony of Airman Peelman. The accomplice testimony of Airman Peelman is corroborated by the accused's admissions of her homosexual relationship with Airman Peelman made to Airman Ryan on 9 July 1981.

45. LEGAL ISSUES

A. Introduction of Article 32 Testimony of Airman Liles

In rebuttal to defense impeachment of the testimony of Airman Ryan on grounds that she had questionable recollection of the events of 6 July 1981 based upon indulgence in alcohol, the government sought to introduce the Article 32 testimony of Airman Liles who the government contended was unavailable under the Military Rules of Evidence (MRE), Rule 804a. The evidence as developed at trial establishes that Airman Liles had been allowed to depart upon emergency leave a few days prior to trial because of his mother suffering a heart attack. The squadron commander elected to not attempt to recall Airman Liles (R.11). The Article 32 testimony was only prepared the day prior to trial and notice of the government's intent to attempt to present the Article 32 testimony at trial was provided defense the afternoon prior to trial. In reaching his determination of unavailability of the witness, the military judge appears to have based his determination upon MRE, Rule 804 (a) (4) and/or (5). I conclude the determination

that the witness is unavailable is erroneous under either provision. Subparagraph 5 clearly does not apply as the trial counsel acknowledged the unit commander made a decision not to attempt to recall the witness. Subparagraph 4, despite argument by trial counsel to the contrary, has traditionally been limited to unavailability based upon death or illness of the declarant. Saltzburg, Federal Rules of Evidence Manual, p.606 (1977). As an alternative basis for admissibility of the prior testimony the military judge relies upon MRE, Rule 803(24). I find this rule equally inapplicable as a basis for admission, as I conclude the Article 32 testimony is no more probative than the testimony of the witness would be and there is no showing that the testimony of the witness could not be obtained through reasonable efforts. Concluding that the introduction of the Article 32 testimony of Airman Liles was error, we must now evaluate the appropriate remedy for the error. While I consider it arguable that the introduction of this testimony was harmless in view of the testimony of Airman Ryan which I consider to be sufficient by itself to support a finding of guilty beyond a reasonable doubt as to the 6 July 1981 offenses, in view of the concern expressed by the government in seeking to offer this evidence to counter what they see as impeachment of Airman Ryan concerning the 6 July 1981 incident, I recommend you disapprove the findings of guilty of the two 6 July 1981 offenses.

B. Possession of Amphetamines

In the specification of Charge II the accused is charged with the possession of amphetamines at Clay, New York, during the period 15 December 1980 to 1 September 1981 in violation of paragraph 3-4, AFR 30-2, dated 22 June 1981, and/or Paragraph 4-4, AFR 30-2, dated 8 November 1976. To approve the finding of guilty of this charge you must be convinced beyond reasonable doubt that the capsules referred to at trial as "Black Beauties" and clearly

believed by the accused and Airman Peelman to be amphetamines were in fact amphetamines. I conclude the only evidence available to support this conclusion is the testimony of Airman Peelman that when she took this substance she experienced a "supersonic effect." In the absence of any testimony establishing that Airman Peelman qualifies as an expert concerning the results of amphetamine use, I conclude reasonable doubt exists as to what this substance in fact was. I therefore recommend you approve only so much of the finding of Charge II as includes the lesser included offense of attempted violation of the same regulations, in violation of Article 80, UCMJ, by wrongfully possessing what she believed to be amphetamines.

C. There were no other errors or irregularities which materially prejudiced the substantial rights of the accused, and I conclude the evidence discussed above, properly supports the remaining findings of the military judge, of the accused's guilt, beyond a reasonable doubt. The following matters do, however, deserve comment.

(1) Motion to Dismiss Based Upon Denial of Right to Counsel

At the commencement of the AFOSI investigation in this case, Captain Powers, then ADC at Griffiss AFB, New York, was appointed and served as defense counsel for both the accused and Airman Peelman. While a potential conflict of interest was recognized none then existed (R.17-22). At a later time Captain Smith took over Captain Powers' ADC duties upon the PCS reassignment of Captain Powers. These duties included representation of both the accused and Airman Peelman. In October 1981, the government initiated and obtained immunity for Airman Peelman. The defense did not initiate or request this immunity (R.35). When the immunity was granted an actual conflict of interest existed between the accused and Airman

Peelman so Captain Smith's supervisor, Lieutenant Colonel Sweeney, relieved Captain Smith of duties representing the accused and assigned the accused another defense counsel. Captain Smith continued to represent Airman Peelman (R.32). The defense contends this chain of events warrants dismissal of charges based upon violation of the 6th Amendment and denial of effective assistance of counsel to the accused. The defense cites no authority for their position. I conclude the record establishes no impropriety concerning the accused's right to counsel and that the military judge properly denied the motion (see People v. Davis, 26 Cal. Rpts. 903 [Cal. Dist. Ct. of Appeals, 3rd Dist., 1962])

(2) Jurisdiction

As Charge IV is alleged to have taken place on a military installation, military jurisdiction exists. United States v. Paxino, 18 USCMA 608, 40 CMR 320 (1969). Charge I, II, and III allege off-base drug offenses by the accused, an officer in the United States Air Force, involving or in the presence of enlisted personnel of the United States Air Force. The circumstances of these drug offenses establish the existence of service connection over them. United States v. Trottier, 9 MJ 337 (CMA 1980). It has been held that the Air Force has jurisdiction over off-base sodomy charges between members of the military where the continuing course of homosexual conduct between the accused and the co-actor was inextricably bound up with their duty performance. United States v. Brown, 8 M.J. 501 (AFCMR 1979); pet. denied 8 M.J. 234 (1980). See also United States v. Coronado, 11 M.J. 522 (AFCMR 1981).

46. EVIDENCE BEFORE SENTENCE

A. For the prosecution

The accused was entitled to wear the training

ribbon for OTS.

B. For the Defense

Colonel Richard I. Lay, Jr., testified he has known the accused for several years, since her arrival on-base, in his capacity as the assistant deputy for operation, the section in which the accused is assigned. He states she has a good work record and has performed all duties assigned to her. He is familiar with the accused's job and considers it a position of responsibility. He does not believe a person convicted of the offenses the accused was found guilty of has the attributes an officer in the Air Force should possess.

Lieutenant Colonel Duaine E. Alderman, the 2lst Air Division, Director of Operations and Training, testified that he knew the accused from working with her on the battle staff where she was the Aircraft Control Warning Officer. They worked together for about two years. He has observed her to be a good worker. He is currently her reporting official and has given her one OER which he considers to be a good one. He finds her conscientious and a cooperative worker. He has never seen her come in drunk or had to write her up.

Chief Master Sergeant Andrew Watson testified he had known the accused slightly over two years as a friend and coworker. He has found her to have a capable mind. He has never seen her come to work under the influence of drugs or alcohol. He had the impression that she was able to perform her duties at all times she was at work.

The defense introduced the accused's OERs for the period 24 April 1981 through 21 October 1981 and 24 October 1980 through 23 April 1981 with evaluations of potential of "1" and the accused's OERs for the period 24 April 1980 through 23 October 1980 and 29 November 1979 through 23 April 1980 with evaluations of potential of "2" and

four certificates of training.

The testimony of Commander Strachi was received by stipulation. He testified he knows the accused at work where he was Plans Officer. He had known her for two years and found her a proficient officer and a loyal member of the Air Force. He found her reliable and an asset to the battle staff.

47. ANALYSIS OF SENTENCE

The accused was sentenced to dismissal, confinement at hard labor for seven years, and total forfeitures. The sentence is within the maximum punishment established by the President for the offenses to which the accused was convicted. While I consider the sentence to be reasonable considering the multiple incidents of sodomy and drug abuse by an officer with, and in the presence of, enlisted personnel, of which the accused was convicted, I believe, in light of my conclusions recommending disapproval of the findings of Specifications 1 and 2 of Charge I, and approval of the lesser included offense of attempted possession of amphetamines under Charge II that re-evaluation of the sentence is appropriate. Specifications 1 and 2 of Charge I were treated as multiplicious by the military judge for sentencing purposes so they are one offense for purposes of this re-evaluation.

I consider the disapproval of the 6 July 1981 offenses and conversion of the possession finding in Charge II to an attempt to have minimal impact upon the overall weight of the misconduct of the accused available for consideration upon sentence. However, weighing all the facts concerning an appropriate sentence I recommend only so much of the sentence be approved as includes dismissal, confinement at hard labor for six years, and total forfeitures. I recommend that the accused be confined at the United States Disciplinary Barracks, Fort Leavenworth, Kansas.

48. OPINION

With particular reference to MCM, 1969 (Rev.), paragraph 86b, it is my opinion that:

A. The court was legally constituted throughout the trial and had jurisdiction over the offenses charged and the person tried.

B. There is nothing in the record of trial or allied papers to indicate that the accused did not possess the requisite mental capacity at the time of trial or the requisite mental responsibility at the time of the commission of the offenses.

C. The competent evidence of record is legally sufficient to support the findings and establishes beyond a reasonable doubt each and every element of the offenses recommended for approval, except as discussed above concerning Charge II where the evidence is legally sufficient to support the finding of guilty as to the lesser included offense, recommended for approval.

D. The sentence was within the power of the court to adjudge and within the prescribed limitations on punishment.

E. There were no errors or irregularities other than those discussed above which materially prejudiced the substantial rights of the accused within the meaning of Article 59, UCMJ.

49. CLEMENCY

Upon being advised of her rights to a formal clemency interview the accused elected to not request such interview. No clemency matters have to date been received from the defense or accused.

50. RECOMMENDATIONS

A. Consistent with the previous discussion, I

recommend the findings of guilty of Specifications 1 and 2 of Charge I be disapproved, and only so much of the finding concerning Charge II be approved as includes the lesser included offense of attempt to violate paragraph 3-4, AFR 30-2, dated 22 June 1981, and/or paragraph 4-4, AFR 30-2, dated 8 November 1976, by possessing what the accused believed to be amphetamines. I recommend the remaining findings be approved.

B. I recommend only so much of the sentence be approved as includes dismissal, confinement at hard labor for six years, and total forfeitures.

C. I recommend the record of trial be forwarded to the Judge Advocate General of the United States Air Force for submission to the Air Force Court of Military Review.

51. SUMMARY

A. The foregoing review constitutes this reviewer's summary of the evidence, opinion as to the adequacy and weight of the evidence, effect of any error or irregularity respecting the proceedings, and recommendations as to the action to be taken with regard to the findings and the sentence. As the convening authority in this case, you are empowered to weigh the evidence, judge the credibility of the witnesses and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses. Before approving a finding of guilty, you must determine: (1) that the court was legally constituted throughout the trial, (2) that the court had jurisdiction over the offenses and the accused, and (3) that there were no errors which materially prejudiced the accused's substantial rights. You must also be satisfied that competent evidence of record establishes beyond a reasonable doubt: (1) the existence of each element of the offenses which you approve, (2) that the accused had the requisite mental responsibility at the time of the commission of the offenses, and (3) that the accused

had the requisite mental capacity at the time of trial. In acting on the findings and sentence, you are empowered to approve only such findings of guilty and sentence, or such part or amount of the sentence, including a sentence which is changed from, but is lesser than, that adjudged by the trial court, as you find correct in law and fact and as you in your discretion determine should be approved.

B. A form of action appropriate to my recommendation is attached.

/s/JAMESM. CHURCHILL
Lieutenant Colonel, USAF
Assistant Staff Judge Advocate
2 Atch
1. Clemency Report
2. Record of Trial

I have read the record of trial and the foregoing review. I concur with the review and the opinions and recommendations made therein. I adopt it as my own.

/s/JOSEPHL. FULLER
Colonel, USAF
Staff Judge Advocate

On 10 May 1972 a copy of the Staff Judge Advocate's review was served upon Ms. Faith Seidenberg, Individual Defense Counsel. On that day Ms. Seidenberg requested delay in furnishing comments pursuant to United States v. Goode until 31 May 1982. This request for delay was approved. On 4 June 1982 we were furnished a Memorandum of Law provided by the defense to the assistant trial counsel. We choose to treat this as the defense Goode response. On 7 June 1982, the original, which had been sent to the 9 AF/CC, was received.

In this memorandum Ms. Seidenberg attacks the Government case and the review in three areas. She first

restates the defense position made at trial that the accused was denied effective assistance of counsel under the Sixth Amendment to the Constitution when she was assigned a defense counsel who worked against her interests. This issue is discussed in paragraph 45c(l) above. In support of the position that a defendant has a right to counsel free from conflicting interests, the defense cites Glosser v. United States, 315 U.S. 60; 62 Sup Ct Rep. 457 (1942). This case held in a case where a conflict existed and the defendant requested to be represented by a separate counsel from the counsel representing a co-accused, it was error to deny this request. This case presents no value of precedent to our facts as upon fruition of the potential conflict the present accused was appointed a counsel with no conflicting interests.

The defense goes to extensive lengths to establish the accused disclosed confidences to both Captain Powers and Captain Smith; however, there is no showing that the matters disclosed in confidence were ever employed in a manner adverse to the interests of the accused. The defense contends that my review at page 9 admits that there was a conflict of interest in Captain Smith's "recommendation" of both the defendant and Airman Peelman. They contend this recognition implies impropriety. I disagree. The recognition of an actual conflict of interest required action on the part of the Government to eliminate the conflict. The record discloses appropriate action was taken by Colonel Sweeney in obtaining new counsel, unincumbered by the conflict when actual conflict arose with the grant of immunity to Airman Peelman.

I conclude the defendant was in no way denied effective assistance of counsel and that there is no evidence that either Captain Powers or Captain Smith at any time worked against her interests. The defense contends the appointed defense attorney urged one of his clients to testify against the other. I disagree. The evidence reflects Captain Smith advised Airman Peelman that when she was given

immunity she had few options but to testify (R.4l). While the defense repeatedly alleges that Captain Smith acted contrary to the defendant's interest the evidence does not support these allegations. The military judge therefore properly denied the defense motion to dismiss.

The defense next contends the defendant is entitled to a new trial because of prosecutorial misconduct. This motion was not discussed in the review because I concluded that after discussion between the military judge and the defense that the matters raised concerning this issue were resolved to the satisfaction of the defense (R.57-66).

It has been held that suppression by the prosecution of evidence requested by the defense may constitute a violation of due process where the evidence was material to guilt or punishment, irrespective of the good faith or bad faith of the prosecution. Phillips v. Smith, 632 F2d 1019 (1980). The defense finds a series of occurrences of misconduct present in this case giving rise to due process violations. I disagree. The defense contends that it was prosecutorial misconduct for the Government to not provide the defense with verbatim transcripts of the testimony of witnesses at the two Article 32 investigations. AFM 111-1, paragraph 3-20 provides verbatim testimony of Article 32 witnesses may be prepared only with the advance approval of the Staff Judge Advocate of the special court-martial convening authority. The record contains no evidence such approval was requested or obtained so no entitlement existed to this matter.

Next, the defense alleges that the defendant was called to the SJA's office on several occasions when the defense was not notified or allowed to be present. While it would appear that professional courtesy would be better served by providing notice when administrative actions such as service of charges require the presence of the accused, the failure to do so is clearly not prosecutorial misconduct. There is no showing any evidence was obtained at these instances or that a situation took place at which the

defendant was entitled to counsel.

Next, the defense alleges the offering of the Article 32 testimony of Airman Liles, instead of calling him in person to testify at trial, constitutes prosecutorial misconduct. While I concluded in paragraph 45A above that introduction of this evidence was erroneous, I see no basis for concluding that in offering this evidence the prosecution acted with evil motive. I conclude the relief recommended in paragraph 45A is appropriate and sufficient to cure this error and that the defense is not entitled, as they request, to a new trial.

Next, the defense alleges the prosecution acted improperly concerning defense requested witnesses. They complain the defense was denied one witness and that a second who was approved, was only notified by the defense of the trial date. The defense remedy to a Government denial of a requested defense witness is to renew the request at trial before the military judge. MCM 1969 (Rev), para 115. This was not done by the defense in this case, and the defense did not establish that they had been denied the presence of an essential witness. The record does not establish prosecutorial misconduct in this area.

Next, the defense contends they were not furnished statements of witnesses Peelman, Liles and Moreno requested as discovery materials under Brady v. Maryland, 373 U.S. 83 (1963). The record contains no reference to a statement by a "Moreno" and no one by that name is listed on the Charge Sheets or referenced in the Article 32 investigation as a witness. At trial it was established the defense was furnished copies of all statements by Peelman and Liles in the possession of the prosecution (R.39-61).

Next, the defense alleges the military judge improperly failed to make inquiry into the facts of the alleged prosecutorial misconduct under the requirements established in United States v. Oaks, 508 F.2d 1403 (1974). In that case it was held that upon a proper offer of proof the defendant was entitled to present evidence, if any, concerning the alleged misconduct. This hearing requirement only arises

where the judge finds that the offer of proof raises matters which if established warrant relief. I believe the military judge concluded the defense offer of proof did not state facts which if established would warrant relief. I reached a similar conclusion in deciding discussion of the defense motion to dismiss based upon prosecutorial misconduct did not initially warrant discussion in this review. I now conclude the denial of the defense motion to dismiss based upon prosecutorial misconduct made by the military judge (R.66) was proper.

As a last issue the defense contends the sentence was excessive in view of all the facts. The defense contends that smoking marijuana and consensual sodomy are not crimes in New York State and that in any event the accused would receive no greater sentence than probation in a state or federal court. The short answer to this allegation is that the accused was not tried in a New York State court but rather in a military court where the offenses alleged are criminal acts. See United States v. Thomas, 12 USCMA 278, 32 CMR 278 (1962); and United States v. Giles, 42 CMR 970 (AFCMR, 1970). In view of the nature of the accused officer's actions in both distributing contraband drugs to enlisted personnel and engaging in homosexual relations with an enlisted woman from her organization, I consider the sentence recommended for approval to be reasonable. The remarks provided by counsel for the accused are attached in full for your consideration. I adhere to the review, including opinions and recommendations made therein. If you concur, an action designed to effect those recommendations is attached for your signature.

/s/JAMESM. CHURCHILL
Lieutenant Colonel, USAF
Assistant Staff Judge Advocate

3 Atch
1-2. nc
3. Defense Response to Review

I concur.

/s/JOSEPHL.FULLER
Colonel, USAF
Senior Judge Advocate

DEPARTMENT OF AIR FORCE
HEADQUARTERS TWELFTH AIR FORCE (TAC)
Bergstrom Air Force Base, Texas 78743

General Court-Martial Order
No. 9
10 June 1982

Before a general court-martial which convened at Hancock Field, New York, pursuant to Special Order AB-9, Headquarters Ninth Air Force, dated 6 Feb 1982, as amended by Special Order AB-23, Headquarters Ninth Air Force, dated 4 March 1982, was arraigned and tried:

SECOND LIEUTENANT JOANN C. NEWAK, 167-38-0452FV, United States Air Force, 2lst Air Division.

CHARGE I: Violation Of the Uniform Code of Military Justice, Article 80.

Specification 1: In that SECOND LIEUTENANT JOANN C. NEWAK, United States Air Force, 2lst Air Division, did, at North Syracuse, New York, on or about 5 6 July 1981, attempt to violate a lawful general regulation, to wit: paragraph 3-4, Air Force Regulation 30-2, dated 22 June 1981, by wrongfully transferring a substance she believed to be amphetamines.

Specification 2: In that SECOND LIEUTENANT JOANN C. NEWAK, United States Air Force, 2lst Air Division, did, at North Syracuse, New York, on or about 6 July 1981, attempt to violate a lawful general regulation, to wit: paragraph 3-4, Air Force Regulation 30-2, dated 22 June 1981, by wrongfully using a substance she believed to be amphetamines.

Specification 3: In that SECOND LIEUTENANT JOANN C.NEWAK, United States Air Force, 2lst Air Division, did, at

Clay, New York, on or about 10 July 1981, attempt to violate lawful general regulation, to wit: paragraph 3-4, Air Force Regulation 30-2, dated 22 June 1981, by wrongfully transferring a substance she believed to be amphetamines.

CHARGE II: Violation of the Uniform Code of Military Justice, Article 92.

Specification: In that SECOND LIEUTENANT JOANN C. NEWAK, United States Air Force, 21st Air Division, did, at Clay, New York, on numerous occasions, from on or about 15 December 1980, to on or about 1 September 1981, violate a lawful general regulation, to wit: paragraph 3-4, Air Force Regulation 30-2, dated 22 June 1981, and/or paragraph 4-4, Air Force Regulation 30-2, dated 8 November 1976, by wrongfully having in her possession some amphetamines.

CHARGE III: Violation of the Uniform Code of Military Justice, Article 134.

Specification 1: In that SECOND LIEUTENANT JOANN C. NEWAK, United States Air Force, 2lst Air Division, did, at Clay, New York, on numerous occasions, from on or about 15 December, 1980, to on or about 1 September 1981, wrongfully use marijuana.

Specification 2: In that SECOND LIEUTENANT JOANN C. NEWAK, United States Air Force, 2lst Air Division, did, at Clay, New York, on numerous occasions, from on or about 15 December 1980, to on or about 1 September 1981, wrongfully have in her possession some amount of marijuana.

Specification 3: In that SECOND LIEUTENANT JOANN C. NEWAK, United States Air Force 2lst Air Division, did, at Clay, New York, on numerous occasions, from on or about

15 December 1980, to on or about 1 September 1981, wrongfully transfer marijuana.

CHARGE IV: Violation of the Uniform Code of Military Justice, Article 133.

Specification 1: In that SECOND LIEUTENANT JOANN C. NEWAK, United States Air Force 2lst Air Division, did, at Hancock Field, North Syracuse, New York, on or about 17 June 198l, engage in conduct unbecoming an officer and a gentleman, to wit, wrongfully suggest to an enlisted female person of the Air Force, that such person was bisexual and proceeded without authority to kiss the enlisted person on her neck and say "I love you."

Additional Charge: Violation Of the Uniform Code of Military Justice, Article 125.

Specification 1: In that SECOND LIEUTENANT JOANN C. NEWAK, United States Air Force, 2lst Air Division, did, at Clay, New York, on numerous occasions from or about 27 May 1981, to on or about 1 September 1981, commit sodomy with Senior Airman Lynne E. Peelman.

Specification 2: In that SECOND LIEUTENANT JOANN C. NEWAK, United States Air Force, 2lst Air Division, did, at Vandling, Pennsylvania, on or about 6 July 1981, commit sodomy with Senior Airman Lynne E. Peelman.

Specification 3: In that SECOND LIEUTENANT JOANN C. NEWAK, United States Air Force, 2lst Air Division, did, at Lexington, Tennessee, during August, 1981, commit sodomy with Senior Airman Lynne E. Peelman.

PLEAS: To all specifications and Charges: Not Guilty.

FINDINGS: Of specifications 1, 2 and 3 of Charge I and Charge I:

Guilty.

Of the specification of Charge II: Guilty, except the words, "...on numerous occasions." Of the excepted words, not guilty. Of Charge II: Guilty.

Of Specifications 1, 2 and 3 of Charge III and Charge III: Guilty.

Of the Specifications of Charge IV and of Charge IV: Guilty.

Of Specification 1 and 2 of the Additional Charge: Guilty.

Of Specification 3 of the Additional Charge: Guilty.

Of the Additional Charge: Guilty.

SENTENCE: To be dismissed from the service, to be confined at hard labor for seven (7) years, and to forfiet all pay and allowances.

DATE ADJUDGED: The sentence was adjudged on 11 March 1982.

ACTION OF THE CONVENING AUTHORITY:

DEPARTMENT OF THE AIR FORCE, HEADQUARTERS TWELFTH AIR FORCE (TAC)
Bergstrom Air Force Base, Texas 78743
10 June 1982

In the foregoing case of 2ND LIEUTENANT JOANN C. NEWAK, 167-38-0425FV, United States Air Force, 2lst Air Division, the findings of guilty of Specifications 1 and 2 of Charge I are disapproved and only so much of the finding concerning Charge II is approved as includes the lesser included offense of attempt to violate paragraph 3-4, AFR 30-2, dated 22 June 1981, and/or paragraph 4-4, AFR 30-2, dated 8 November 1976, by possessing what the accused believed to be amphetamines, at the times and places alleged, in violation of Article 80. Only so much of the sentence as provides for dismissal, confinement at hard labor for six years and total forfeitures is approved. The service of the sentence to confinement at hard labor for seven years was deferred on 15 March 1982 and the deferment is rescinded effective the date of this action. The forfeiture shall apply to pay and allowances becoming due on and after the date of this action. The record of trial is forwarded to the Judge Advocate General of the United States Air Force for review by a Court of Military Review. Pending completion of appellate review, the accused will be confined in the United States Disciplinary Barracks, Fort Leavenworth, Kansas or elsewhere as competent authority may direct.

/s/WILLIAM R. NELSON
Lieutenant General, USAF
Commander

FOR THE COMMANDER

/s/JAMESM CHURCHILL
Lieutenant Colonel, USAF
Assistant Staff Judge Advocate

UNITED STATES AIR FORCE
COURT OF MILITARY REVIEW

UNITED STATES

v

Second Lieutenant JOANN C. NEWAK,
167-38-0452 FV
UNITED STATES AIR FORCE

ACM 23544

Argued: 15 October 1982
Decided: 14 December 1982
Sentence adjudged 11 March 1982 by GCM convened atHancock Field, New York.
Military Judge: Robert H. Leonard (sitting alone).

Approved sentence: Dismissal, confinement at hard labor for six (6) years and forfeiture of all pay and allowances.

Appellate Counsel for the Accused: Ms. Faith A. Seidenberg, Syracuse, New York.
Appellate Counsel for the United States: Colonel Kenneth R. Regert and Captain Brenda J. Hollis.

Before
HODGSON, HEMMINGWAY and MILLER
Appellate Military Judges

DECISION

HODGSON, Chief Judge:

Tried by general court-martial with the military judge sitting alone, the accused was convicted, despite her pleas, of wrongfully using, possessing and transferring marijuana, attempting to wrongfully possess and transfer a substance she believed to be amphetamines; sodomy, and conduct unbecoming an officer, in violation of Articles 80, 125, 133 and 134, Uniform Code of Military Justice. The approved sentence extends to a dismissal, forfeiture of all pay and allowances, and confinement at hard labor for six years.

I

At the outset, we are faced with the assertion that the accused was deprived of effective assistance of counsel under the Sixth Amendment because her assigned military defense counsel, Captain S, worked against her interests. The record disclosed that the Area Defense Counsel (ADC) assigned to Griffiss Air Force Base, New York, also provides defense services [1] to Hancock Filed, New York, where the accused is assigned and where her trial took place. In the summer of 1981, Captain P was the ADC at Griffis AFB and was appointed to represent the accused and Senior Airman Peelman, who were being investigated for alleged homosexual activities. During this time period Captain P was notified of his reassignment that fall, and told that Captain S, who was assigned to the Griffiss AFB legal office, was to be his replacement.

To insure an orderly changeover, Captain P took Captain S to Hancock Field and introduced him to the accused and later, in a separate interview, to Peelman. Captain P indicated to both individuals that he was leaving and that Captain S would be the new ADC. Captain P then discussed various aspects of each case with the parties

concerned, with Captain S present; these interviews occurred in early September and were conducted at the Hancock Field legal office. At this time Captain S was still assigned to Griffiss AFB.

On approximately 20 October, Captain S became aware that his representation of both the accused and Peelman might result in a conflict of interest as the result of the government giving Peelman a grant of immunity.[2] The subject was broached to him by the Staff Judge Advocate, Hancock Field. Upon learning of the grant, Captains P and S called the Chief Circuit Defense Counsel whose responsibility is the professional supervision of all Area Defense Counsel with the circuit. See United States v Cahill, 3 M.J. 1030 (N.C.M.R. 1977). The situation was outlined to him and he concluded that Captain S could not represent the accused; accordingly, a different ADC was appointed as her counsel. This attorney assisted in her defense at both the pretrial investigation and the trial itself; the accused also retained a civilian attorney as lead counsel. Captain S continued as counsel for Peelman. Subsequently, he also represented Airman Liles. Both Liles and Peelman testified against the accused under grants of immunity. Captain S admitted telling Liles and Peelman "to stay away from Newak because she's going down the tubes."

The rule that an attorney cannot represent conflicting interests is one that courts strictly enforce. United States v Melton, 30 C.M.R. 796 (A.F.B.R. 1960). Here, however, we note that the conflicting interests were identified early in the proceedings and a new attorney was appointed for the accused before charges were preferred. See People v Davis, 26 Cal. Rpt. 903, 1962). We find it significant that Captain S did not represent the accused at either the pretrial investigation or at the trial itself. Cf United States v Davis, 3 M.J. 430 (C.M.A. 1977) (defense counsel cross-examined a former client at trial).

Prior representation by defense counsel of a government witness against the accused does not itself

justify a conclusion that the accused does not by itself justify a conclusion that the accused was denied effective representation, particularly when that defense counsel does not represent the accused at trial. United States v Lovett, 7 U.S.C.M.A. 704, 23 C.M.R. 168 (1957); United States v Peebles, 2 M.J. 404 (A.C.M.R. 1975). It must also be shown that the accused was harmed by the relationship. United States v Thornton, 8 U.S.C.M.A. 57, 23 C.M.R. (1957).

The accused seeks to establish this harm by showing that Captain S was assigned to the Griffiss legal office at the time he entered into an attorney-client relationship with her. This, in her view, is sufficient to prove prejudice as it suggests that her assigned counsel had divided loyalties. We do not attach the same importance to this as does appellate defense counsel. The Griffiss legal office and the Hancock legal office are separate organizations in different chains of command.[3] Griffiss legal office has absolutely no control over trials convened at Hancock Field. Thus, that Captain S was ostensibly still assigned to the Griffiss office when he spoke to the accused could not have influenced a trial at Hancock Field in any way.

Next, appellate counsel argues that the subsequent representation by Captain S of Peelman and Liles, who testified against the accused, shows that S had abandoned her while still her counsel. Finally, appellate counsel finds fault in the facts that both Captains S and P used the Hancock Field legal office to interview potential witnesses. This, she contends, is an unjustified causal approach to the confidentiality of the attorney-client relationship and indicative of the quality of the representation the accused received prior to charges being preferred. Both military counsel stated that this was done as a matter of convenience since Hancock Field had no ADC office.

These circumstances, in our opinion do not amount to ineffective representation. The accused was given different counsel when it became apparent that she, Peelman and Liles could not all be presented by Captain S. Again we note

that this was accomplished early in the proceedings prior to the charges being preferred. We admit that Captain S was less than discreet when he later suggested that Peelman and Liles avoid the company of the accused "as she was going down the tubes," but it is not contended that he induced them to testify falsely or divulged to them information given him in confidence by the accused. In short, we find that the accused has suffered no prejudice. We conclude that Captain S adequately protected the confidences given him by accused, and she was not denied effective assistance of counsel. Accord United States v Barrois, 47 C.M.R. 169 (A.C.M.R. 1973); see also United States v Brooks, 2 M.J. 102 (C.M.A. 1977).

II

The accused next contends that her conviction of attempting to wrongfully possess and transfer amphetamines cannot stand as the substance was in fact "over the counter" diet pills. (Specification 3 of Charge I and Specification of Charge II). Therefore, according to her, the crime charged is legally impossible. We disagree. To constitute an attempt to commit a crime there must be an intent to commit the crime, an overt act toward its commission, and its consummation must be apparently possible. Manual for Courts-Martial, United States, 1969 (Rev.), para. 159. The question of whether the accused attempted to possess or transfer an illicit drug does not depend upon the true nature of the substances involved. United States v Dominguez, 7 U.S.C.M.A. 485, 22 C.M.R. 275 (1957). Here the record established that the accused thought the substances was amphetamine and therefore that the commission of the offense was apparently possible. United States v Foster, 14 M.J. 246 (C.M.A. 1982). See generally, United States v Bruce, 14 M.J. 254 (C.M.A. 1982).

III

Finally, appellate counsel urges that the sentence was excessive and that confinement of any duration would be inappropriate. We cannot ignore that the accused, an officer, encouraged the use of marijuana and other illicit drugs among Air Force personnel, and committed numerous acts of sodomy with a female enlisted person. Upon consideration of the total record, we find the sentence entirely appropriate.

We have considered the remaining assigned error and have resolved it adversely to the accused. Accordingly, the findings of guilty and the sentence are

AFFIRMED.

HEMMINGWAY, Senior Judge (concurring):

During oral argument, counsel for the accused urged a reduction in the sentence because the accused crimes were committed off duty, off base and would not have been punished as severely in a civilian community. This argument fails to recognize "that the military is, by necessity, a specialized society separate from civilian society." Parker v. Levy, 417 U.S. 733, 94 S.Ct. 2547, 41 L.Ed. 2d 439 (1974). This difference is due to the mission of the military to maintain the ability to fight when our national leadership determines it necessary to preserve our security. This mission requires discipline and obedience. Commissioned officers have a special responsibility to conduct themselves in a manner that promotes discipline, obedience and respect. That responsibility cannot be checked at the gate on the way home at the end of the duty day. Officers who fail to meet that responsibility by engaging in criminal conduct in the presence of subordinates violates their oath of office and strike at the heart of the military code of behavior. As a result, I view the accused's sentence as appropriate.

MILLER, Judge (concurring)

[Opinion omitted]

FOOTNOTES:

[1] A full description of his duties is contained in Air Force Manual 111-1, Military Justice Guide, para. 13-2, 2 July 1973, Change 4 (13 May 1980).

[2] On 17 November 1981, Peelman was given a grant of immunity by the Commander, 9th Air Force.

[3] Griffiss Air Force Base is assigned to 8th Air Force, Strategic Air command, while Hancock Field is assigned to 9th Air Force, Tactical Air Command.

DEPARTMENT OF THE AIR FORCE
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON, D.C.
AF/JA
23 Mar 1983

U N I T E D S T A T E S
v

ACM 23544

Second Lieutenant
JOANNE C. NEWAK
167-38-0452FV

ACTION OF THE
THE JUDGE ADVOCATE GENERAL

In the above case, upon careful examination, I conclude that the term of confinement should be modified. In consequence, pursuant to Article 74(a) of the Uniform Code of Military Justice, as implemented by paragraph 12-2d, AFM 111-1, I take the following action:

> So much of the sentence as provides for confinement at hard labor in excess of three years is remitted.

/s/THOMAS B. BRUTON
Major General, USAF
The Judge Advocate General

UNITED STATES, Appellee,

v.

Joann C. NEWAK, Second Lieutenant,
U.S. Air Force, Appellant.

No. 46098.
ACM 23544.

U.S. Court of Military Appeals.
July 13, 1987.

Accused, a second lieutenant, United States Air Force, was convicted by general court-martial, Robert H. Leonard, J., of wrongfully using, possessing and transferring marijuana, attempting to wrongfully possess and transfer substance believed to be amphetamines, sodomy and conduct unbecoming an officer, and she appealed. The United States Air Force Court of Military Review, 15 M.J. 541, affirmed, and review was granted. The United States Court of Military Appeals, Everett, C.J., held that accused was denied effective assistance of counsel due to joint representation.

Reversed and remanded.

Cox, J., concurred in result and filed opinion.

For Appellant: Faith A. Seidenberg, Esq. (argued); Louis P. Font, Esq. and Major Alexander S. Nichols.

For Appellee: Lieutenant Colonel Robert E. Giovagnoni (argued); Colonel Kenneth R. Rengert and Major Robert E. Ferencik, Jr. (on brief); Captain Brenda J. Hollis.

James R. Klimaski, Esq. (argued); Charles T Burner, Esq and Carol L. Delton, Esq. (on brief) - For Military Law Task Force of the National Lawyers Guild.

David W Webber, Esq. (on brief); Abby R.Rubenfeld, Esq. - For Lambda Legal Defense and Education Fund, Inc.

OPINION

EVERETT, Chief Judge:

Second Lieutenant Newak was tried by a military judge sitting alone as a general court-martial on charges that she used, possessed, and transferred marijuana; possessed amphetamines; attempted to transfer amphetamines by transferring a substance which she erroneously believed was amphetamine (2 specifications); attempted to use amphetamines by using a substance which she erroneously believed was amphetamine; committed sodomy with an enlisted woman (3 specifications); and engaged in conduct unbecoming an officer with a woman enlistee, in violation of Articles 134, 92, 80, 125, and 133, Uniform Code of Military Justice, 10 U.S.C. Sections 934, 892, 880, 925, and 933, respectively. Despite her pleas, appellant was convicted as charged and sentenced to dismissal from the service, confinement for 7 years, and total forfeitures.

In his review, the convening authority disapproved the guilty findings as to one of the attempted transfers and the attempted use of amphetamine, and he modified the finding of possession of amphetamines to a finding of attempted possession. In all other respects, he approved the trial results, except for reducing the period of confinement to 6 years.

The Court of Military Review affirmed the approved findings and sentence. 15 M.J. 541 (1982). Thereafter, the Judge Advocate General remitted all confinement in excess of 3 years.

In her petition to this Court, Newak complains that she was denied the effective assistance of counsel and due process of law by certain actions against her interest taken by her defense counsel. According to appellant, a conflict of interest arose because the same counsel represented both Newak and the enlisted woman, Airman Lynne Peelman, with

whom she allegedly had sexual relations. 18 M.J. 112. We agree.

I

Sometime in the summer of 1981, an informant implicated appellant and Peelman in various homosexual and drug activities at Hancock Field, New York. Both were called in by an agent of the Office of Special Investigations (OSI) and advised of their rights, whereupon each denied the accusations.

When they were notified later of impending charges against them, both appellant and Peelman were informally assigned to Captain John Powers, then the area defense counsel stationed at Griffiss Air Force Base, New York, and responsible for Hancock Field. Powers saw the women separately and formed an attorney-client relationship with each.

In "late August or early September," Powers was notified that he was to transfer duty stations and that Captain Raymond Smith would assume his role as area defense counsel. Although Smith was not formally assigned to Powers' job until November 1, 1981, Powers sought earlier to acquaint Smith with local procedures and personnel, as well as with the cases he would be leaving behind - including appellant's and Peelman's. At some point, probably early in October, Powers introduced Smith to appellant and to Peelman. He included Smith as counsel in meetings with these two clients, discussed the cases with Smith "on several occasions," and turned over his investigative case files to him. Smith later consulted alone with appellant and with Peelman and entered into an attorney-client relationship with each.

When he was asked at appellant's trial why he had undertaken to represent both appellant and Peelman, Captain Powers responded:

> Well, at the time, there were not charges yet preferred in the beginning stages. They were both under investigation, and they were both in the same position, so to speak, and there was no -at this time, no offer of immunity or anything like that, and at that time, I didn't see the need to split it up and I didn't split it up.

Powers subsequently did acknowledge, however:

> Well, honestly, I saw a potential problem if immunity was offered to one or the other, and I remember discussing with each of them that it could be a problem that sometime, down the road, the government may offer immunity to the other, but at that time, that was just speculation and there had been no mention by the legal office or anybody representing the Government.

As the investigation proceeded through the middle of October, attention focused on appellant. To effectuate the planned prosecution of Newak, the base staff judge advocate, Major Carlos Torres, met with Smith on or about October 20 and informally discussed with him possible testimonial immunity for Peelman. Torres informed Smith that he intended to recommend to the convening authority that Peelman be granted this immunity, and he advised Smith to counsel Peelman to cooperate.

The record is not entirely clear how active was Smith's role in the discussion of immunity with Torres. The Court of Military Review concluded, and the Government argues before us, that the decision to grant Peelman testimonial immunity was unilaterally made by the Government and simply announced to Smith. However, Smith's own testimony tends to support appellant's contention in this Court that it was not quite that cut-and-dried:

> Q: Did you bring up the subject of immunity?
>
> A: With whom?

Q: With the Base Staff Judge Advocate?
A: Not directly, no. They brought it up to me.
Q: And was there any bargaining on your part, between acting for Airman Peelman vis-a-vis the Base Staff Judge Advocate at Hancock?
A: I don't quite understand.
Q: In other words, did you say - did you go in and say, "If you'll give us immunity, no prosecution of Airman Peelman, Airman Peelman will roll on Lieutenant Newak," or anything like that?
A: No, not directly. It was back and forth. They were trying to figure out who to work out immunity with. I was dealing with my client Airman Peelman! as to whether or not that is what she wanted me to work out for her.

(Emphasis added.)

Smith later told Powers of his October 20 conversation with Torres, and together they contacted Lieutenant Colonel Sweeney, the chief circuit defense counsel, to discuss a possible conflict of interest. Smith continued to represent Peelman; but, on October 23 - prior to the formal grant of immunity to Peelman on November 17 - he withdrew as counsel for appellant at Sweeney's direction, and new counsel was assigned to her.

Sometime while he still represented both women, or shortly thereafter - the record is in conflict - Smith met with Peelman and urged her to cooperate under the expected grant of testimonial immunity. Smith probably told Peelman that appellant was "going down the tubes" and that she should limit her own problems by staying away from appellant and cooperating with the prosecution. Indeed, Smith himself ultimately admitted at appellant's trial that, while representing Peelman, his advice to her to cooperate under the anticipated grant of testimonial immunity may have been affected by confidences entrusted by Newak, as was revealed by this colloquy with the military judge: [1]

Q: Were you ever told by Captain Powers what Lieutenant Newak's version of what the potential offenses was?
A: Yes, sir.
Q: So, Captain Powers did relate to you what Newak, what Lieutenant Newak had told him about these offenses?
A: Yes, sir.
Q: Did you ever reveal this information that Captain Powers told you about Lieutenant Newak's version of the offenses, to Airman Peelman?
A: Not consciously, sir.
Q: What do you mean by not consciously?
A: I never took that information and directly related to Airman Peelman.
Q: Do you feel that you might have unconsciously done so?
A: I feel that information may have impacted on my conversations with Airman Peelman.
Q: In what way?
A: Well, after I was separated from Lieutenant Newak, the possibility of immunity came up for Airman Peelman, and I knew some things about Lieutenant Newak that may have influenced how I recommended to Airman Peelman that she should go.

In due course, Peelman became the chief prosecution witness against appellant on a number of the charges against her; Peelman herself never was formally charged or prosecuted.

II

The Court of Military Review, after acknowledging that "[t]he rule that an attorney cannot represent conflicting interests is one that courts strictly enforce," concluded nonetheless that this rule had not been violated here. It did

so,

> not[ing] that the conflicting interests were identified early in the proceedings and a new attorney was appointed for the accused before charges were preferred. See People v. Davis, 210 Cal. App. 2d 721, 26 Cal. Rptr. 903 (1962). We find it significant that Captain S did not represent the accused at either the pretrial investigation or at the trial itself. Cf United States v. Davis, 3 M.J. 430 (C.M.A. 1977) (defense counsel cross-examined a former client at trial).

United States v. Newak, supra at 543. In our view, the court below relied too heavily on the timing of Captain Smith's dual representation and was not sensitive enough to the nature of that representation and its subsequent impact on appellant's trial.

III

This Court has recognized that merely because two or more defendants are represented by the same attorney or attorneys "is not per se violative of constitutional guarantees of effective assistance of counsel," Holloway v. Arkansas, [435 U.S. 475] at 482, 98 S.Ct. [1173,] at 1178 [55 L.Ed. 2d 426 1978], and does not automatically raise an appearance of conflict of interest. Indeed, frequently it may be advantageous for the co-accused to be represented by the same counsel.... As Mr. Justice Frankfurter recognized long ago: "Joint representation is a means of insuring against reciprocal recrimination. A common defense often gives strength against a common attack." Glasser v. United States, 315 U.S. 60, 92, 62 S.Ct. 457, 475, 86 L.Ed. 680 (1942)(dissent). Indeed, "[w]e all hang together, or we all hang separately" could be - in the proper case successful and pragmatic strategy on the part of co-accused. Therefore, it is clear that duality of representation alone is not necessarily violative of the Sixth Amendment.

United States v. Breese, 11 M.J. 17, 19 (C.M.A. 1981).

Nonetheless, as the United States Supreme Court has observed, "a possible conflict [of interest] inheres in almost every instance of multiple representation." Cuyler v. Sullivan, 446 U.S. 335, 348, 100 S.Ct. 1703, 1718, 64 L.Ed. 2d 333 (1980). Accordingly, a defense counsel must be wary of potential conflicts in any instance of multiple representation.

Captain Powers acknowledged that he was aware at the outset that a conflict of interest might develop "down the road" as between appellant and Peelman should one of them be offered immunity [2] and that he discussed this potential with his clients. [3] However, he testified that, because this was just "speculation" at the early stages of his representation, he did nothing more about the problem which loomed on the horizon. Given these circumstances, Captain Powers - and, subsequently, Captain Smith - would have been well-advised to have been more sensitive to this admonition in the ABA Standards, The Defense Function, Standard 4-3.5(b) (2d ed. 1979) [4]:

> The potential for conflict of interest in representing multiple defendants is so grave that ordinarily a lawyer should decline to act for more than one of several co-defendants except in unusual situations when, after careful investigation, it is clear that:
>
> (i) no conflict is likely to develop [5] ;
>
> (ii) the several defendants give an informed consent to such multiple representation; and
>
> (iii) the consent of the defendants is made a matter of judicial record.

(Emphasis added.)

Of course, the two attorneys missed this early opportunity to avoid a potential conflict of interest between appellant and Peelman. Thus, our concern focuses on the propriety of Captain Smith's discussing testimonial immunity for Peelman with Major Torres while Smith still represented

appellant and of Captain Smith's subsequent advice to Peelman concerning cooperation under the anticipated grant of immunity.

It is clear that, whatever was the precise nature of the conversations, discussion took place between Captain Smith and Major Torres - while the former still represented appellant - about the possibility of testimonial immunity for Peelman. It was at this point that a conflict of interest moved from "speculation," as Captain Powers had labeled it, to hard reality.

The Government has sought to downplay these exchanges by characterizing the immunity not as a matter of negotiation but rather as a "fait accompli." This contention overlooks the realities of the criminal justice process. We are aware that often the best defense that can be provided for a person accused of a crime is to offer to assist investigators and prosecutors in return for leniency in some form such as dismissal of charges, and reduction or suspension of sentence. The extent of leniency that can be obtained often varies in proportion to the extent of information being provided and the prominence of the person who is the subject of that information.

Sometimes an accused may be reluctant to obtain personal benefit in this manner; and his attorney may need to explore with him very candidly the gains and losses that would result from his cooperating with law enforcement officials. Sometimes the overall results may be better if an accused does not seek leniency and encourages fellow accused to contest charges. Moreover, the time of negotiations for immunity or leniency in return for cooperation may be important.

In light of the important role of an attorney in advising his client as to cooperation with prosecutors and in negotiating for such benefits as transactional versus testimonial immunity, or a reduced sentence, we cannot gloss over Smith's role as Peelman's legal advisor. If he performed that role in a professional manner, his

performance almost inevitably compromised his role as Newak's legal advisor. Conversely, if he acted effectively for Newak, he could not have performed suitably for Peelman. For example, it might have injured Peelman if Smith had proposed that, in return for acceptance of a resignation in lieu of court-martial, Newak would testify about misconduct of Peelman or others. Likewise, even if maintaining a united front of silence might have benefited Newak, Smith might well have concluded that for him to urge such a course of action would damage Peelman's chance to obtain dismissal of charges in return for offering information about appellant. In short, because Captain Smith was not free to argue against Peelman's interest, he was not free to represent Newak adequately.

By way of analogy to conflicts arising in the context of plea negotiations, we note he following portion of the Commentary to Standard 4-3.5, supra at p. 4.42:

> Frequently, however, the differences or conflicts are more subtle but still make effective, zealous representation of all defendants impossible. During the plea negotiation stage, for example, a lawyer cannot urge identically favorable plea agreements for all of the defendants unless all are identically situated. The presence of even slight differences in the backgrounds of defendants or in their cases (e.g., one defendant held a gun while the other served as a lookout) means that strong advocacy to the prosecutor on behalf of one codefendant necessarily undermines, by comparison, the position of other defendants.

Much the same might well be said of the position in which Captain Smith found himself here via-a-vis the matter of immunity. Under such circumstances, Captain Smith's passivity amounted to nothing less than abandonment of appellant. See United States v. Davis, 9 M.J. 430 (C.M.A. 1977).

Unfortunately, Captain Smith's sacrifice of appellant's interests did not end with this sin of omission but extended, as well, to subsequent sins of commission. After he had severed his relationship with appellant, he continued to represent Peelman in this matter and actively to advise her and encourage her to act in her own self-interest. Sadly for Smith - and for appellant - it is clear that those interests were not parallel to appellant's; indeed, they ran to a point of inevitable confrontation. Under these circumstances, Captain Smith aided the successful prosecution of his former client just as surely as if he had sat at the trial counsel's table and just as surely, this was improper. See generally Art. 27(a), UCMJ, 10 U.S.C. § 827(a) ("nor may any person who has acted for the defense act later in the same case for the prosecution"); accord United States v. Stubbs, 23 M.J. 188 (C.M.A. 1987).

Even more in point, Captain Smith frankly admitted to the military judge that his advice and counsel to Peelman were affected by the confidences with which appellant had entrusted him as her attorney. Surely, this was improper. Smith's duty to safeguard appellant's confidences continued beyond severance of their relationship. See ABA Model Rules of Professional Conduct, Rule 1.6, Comment, "Former Client" (1983). Rule 1.9 of these Model Rules leaves no doubt as to the impropriety of Smith's action in this regard:

> A lawyer who has formerly represented a client in a matter shall not there- after:
>
> (a) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation; or
>
> (b) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 would permit with respect to a client or when the information has become generally known.

The Comment to this rule states in part: "Information acquired by the lawyer in the course of representing a client may not subsequently be used by the lawyer to the disadvantage of the client." See also Rule 1.7 of these Model Rules.

IV

As we noted earlier, the Court of Military Review found saving solace in the fact that the conflict here was caught "early in the proceedings," so that Captain Smith did not represent appellant either at the investigation under Article 32, UCMJ, 10 U.S.C. Section 832, or at trial. United States v. Newak, supra at 543. Implicitly, what the lower court concluded was that, because "conflict-free" counsel represented appellant at all critical stages and, therefore, because she received effective assistance of counsel in her defense, appellant was not prejudiced by these legal and ethical transgressions by her earlier attorneys. See United States v. Wattenbarger, 21 M.J. 41, 46 (C.M.A. 1985), cert denied, - U.S. - , 106 S.Ct. 3272, 91 L.Ed.2d 563 (1986).

This analysis, however, turns a blind eye to the visible continuing ramifications throughout the proceedings of Captain Smith's compromise of appellant's interests. A fair reading of the record leaves no doubt in our minds that, at a minimum, Captain Smith played an important role in producing the testimony of Airman Peelman - testimony which, as to several charges, constituted the only evidence or the principal evidence against appellant. In this light, the skill and competence of appellant's subsequent counsel could not possibly have overcome the damage done by her earlier counsel; to say that appellant was not prejudiced would be to indulge in totally unfounded speculation.

Under the circumstances, the testimony of Peelman and any evidence or information derived therefrom was tainted and should not have been admitted in evidence at

the trial. Accordingly, the findings of guilty as to Charge II and its specification; specification 3 of Charge III; and the Additional Charge and its specifications, as well as the sentence, cannot stand.

Without this evidence, it seems unlikely that the Government can prove these charges at a rehearing; but, if alternative untainted evidence is available, we shall allow a rehearing on those charges. We also are concerned that some "spillover" may have occurred from the findings that were directly tainted to the other findings of guilty. Cf. United States v. Hogan, 20 M.J. 71 (C.M.A. 1985). This issue has not been considered by the Court of Military Review; and we believe that they should have an opportunity to consider it upon remand.

V

The decision of the United States Air Force Court of Military Review is reversed as to Charge II and its specification; specification 3 of Charge III; and the Additional Charge and its specifications, as well as the sentence. The findings of guilty on those charges and specifications and the sentence are set aside. The record of trial is returned to the Judge Advocate General of the Air Force for remand to that court for consideration of the issue of whether the remaining findings of guilty were tainted by the actions of defense counsel. If they were, a rehearing may be ordered on all charges and specifications which were approved by the convening authority. If they were not tainted, a rehearing may be ordered on the specifications and Charges affected by the decision of this Court and the sentence. If a rehearing on findings is deemed impracticable, the affected Charges and specifications may be dismissed. If any specifications remain, a rehearing on sentence may be ordered.

Judge SULLIVAN did not participate.

COX, Judge (concurring in the result):

I agree with Chief Judge Everett to the extent that Airman Peelman's testimony at this trial was so tainted that appellant's conviction of the affected specifications cannot stand, and I agree that the testimony is permanently tainted. I would not preclude the Government from retrying the case with a view towards eliciting new untainted testimony from her during a new trial.

As I read the record of trial, it appears that the military judge was satisfied that no communication from appellant was ever transmitted through Smith to Peelman. If so, there is no reason why Peelman should not now be permitted to testify as to matters of which she has, at all times, had personal knowledge, providing she is willing to testify without immunity. Indeed, if Peelman knew anything about appellant's litigation posture, the record suggests that it was gained directly from appellant herself during their frequent exchanges of information, often immediately following their respective sessions with counsel.

In view of the questions surrounding the involvement of defense counsel and the circumstances of Peelman's testimony, however, I would agree, out of an abundance of caution, that the Government at a rehearing should again establish, by a preponderance of the evidence, that any testimony sought to be introduced was not affected by an improper communication from Smith to Peelman.

Accordingly, I concur in the disposition of the present case decreed by Chief Judge Everett in his opinion.

FOOTNOTES:

[1] There is some indication in the record that appellant's confidences held by Captain Smith may have played a more direct role in his advice to Peelman. When it became apparent during litigation of this matter that Peelman was not going to appear in the courtroom, notwithstanding her being

directed to do so, the military judge admitted into evidence defense counsel's proffered affidavit from Peelman in which, according to defense counsel, Peelman stated "that Captain Smith openly discussed Lieutenant Newak's case with her and, 'He was glad to have me as a client and not her.'" For some unexplained reason, though, this affidavit is not included in the record as an exhibit.

[2] In view of the totally private nature of several of the charged acts Captain Powers' study of the OSI investigative files apparently indicated to him from the beginning, as Major Torres subsequently concluded, that successful prosecution of either appellant or Peelman probably would depend on some sort of immunity being granted to the other.

[3] Although the sixth-amendment right to counsel does not necessarily attach in the military until preferral of charges, United States v. Wattenbarger, 21 M.J. 41, 43 (C.M.A. 1985), cert denied - U.S. - 106 S.Ct. 3272, 91 L.Ed. 2d 563 (1986), it cannot be gainsaid that here an attorney-client relationship existed between appellant on the one hand and Powers and Smith on the other. See Mil. R. Evid. 502(a), (b)(1), and (b)(2), Manual for Courts-Martial, 1969 (Revised edition); United States v. Saenz, 18 M.J. 327, 328 (C.M.A. 1984).

[4] Paragraph 1-11 of Air Force Manual 111-1 (Military Justice Guide) (C. 2, October 1976) states:

> As far as practicable, and when not inconsistent with the Uniform Code of Military Justice, Manual for Courts-Martial, 1969 (Rev.), and departmental directives, the American Bar Association Standards for Criminal Justice are applicable to courts-martial.

Thus, arguably, failure to adhere to this standard violates Air Force regulations and, in the process, denies an accused military due process of law. Cf. United States v. McGraner, 13 M.J. 408, 415 (C.M.A. 1982); United States v.

Dunks, 1 M.J. 254 (C.M.A. 1976).

[5] "[C]areful investigation" in this case should have caused just the opposite conclusion. See n. 2, supra.

[6] The findings which we will set aside are those in which Peelman's testimony constituted either the only evidence of appellant's guilt or such strong evidence that we are unable to conclude that appellant was not prejudiced from Peelman's testimony thereon.

UNITED STATES COURT OF MILITARY APPEALS
U N I T E D S T A T E S,
Appellee

USCMA Dkt. No. 46098/AF

v.

C M R D k t . No. 23544

Joann C. NEWAK (167-38-O4S2),
Appellant

ORDER

On consideration of appellant's motion to specify retention of jurisdiction, it is, by the Court this 19th day of August, 1987,

ORDERED:

That said motion is hereby granted; and

That the decretal paragraph of this Court's opinion (24 M.J. 238) is amended by adding after the last word of said paragraph on page 244 the following sentence:

> Thereafter, and upon completion of any further review required by Article 66, Uniform Code of Military Justice, 10 U.S.C. Section 866, the record will be

returned to this Court for final disposition.

For the Court,

/s/John A. Cutts, III
Deputy Clerk of the Court

cc: The Judge Advocate General
of the Air Force
Appellate Defense Counsel
(SEIDENBERG, Esq.)
Appellate Government Counsel
(GIOVAGNONI)

UNITED STATES AIR FORCE
COURT OF MILITARY REVIEW

UNITED STATES

v.

Second Lieutenant JOANN C. NEWAK,
167-38-0452 FV
UNITED STATES AIR FORCE

ACM 23544 (f rev)

16 OCT 1987

Sentence adjudged 11 March 1982 by GCM convened at Hancock Field, New York. Military Judge: Robert H. Leonard (sitting alone).

Approved sentence: Dismissal, confinement at hard labor for six (6) years and forfeiture of all pay and allowances.

Appellate Counsel for the Appellant: Faith A. Seidenberg, Esq., Syracuse, New York; Louis P. Font, Cambridge, Massachusetts; Colonel Leo L. Sergi and Major Alexander S. Nicholas. Appellate Counsel for the United States: Colonel Joe R. Lamport, Lieutenant Colonel Robert E. Giovagnoni.

Before

HODGSON, FORAY and KOLTE
Appellate Military Judges

DECISION UPON FURTHER REVIEW

HODGSON, Chief Judge:

In our initial review of this record of trial we affirmed Second Lieutenant Newak's conviction for various drug offenses, sodomy with an enlisted woman and conduct unbecoming an officer with yet another enlisted woman. United States v. Newak, 15 M.J. 541 (A.F.C.M.R. 1982).

She appealed our affirmance of her conviction arguing that she was denied effective assistance of counsel and due process of law when her appointed military counsel represented both her and an enlisted woman, Airman Lynne Peelman, with whom she allegedly had sexual relations and who subsequently pleaded guilty and became the chief prosecution witness against her on a number of charges.

The Court of Military Appeals found merit in this argument and concluded that the joint represention of both her and Peelman by the same counsel was improper. The Court held, therefore, that the testimony of Peelman together with any evidence or information derived therefrom was tainted and should not have been admitted in evidence at the trial. Accordingly, it set aside those allegations in which Peelman's testimony was the only evidence of the appellant's guilt or such strong evidence that the prejudicial effect was apparent.[1] United States v. Newak, 24 M.J. 238 (C.M.A. 1987).

Although the affected charges were set aside, the Government was given permission to pursue them again if alternative untainted evidence were available. Our review of the record and the pretrial investigation convinces us that no such evidence exists. We are aware that Judge Cox, who concurred in the result, suggested that Peelman could still testify if the trial judge at the second hearing was satisfied that no communication from the appellant was transmitted through appointed counsel to Peelman. This is not, in our view, a viable course of action, particularly in light of the requirement that Peelman must testify without a grant of immunity. The passage of time and judicial economy both dictate that the alleged sodomy offenses [Specifications of the Additional Charge], and the alleged drug offenses [Specification of Charge II and Specification of Charge III] be dismissed, which we so do.

While the remaining offenses, i.e., use and possession of marijuana and the attempted possession of amphetamine and conduct unbecoming an officer, were not set aside by the Court of Military Appeals, it expressed a concern that some "spillover" might have taken place from the tainted offenses to the remaining guilty findings. They suggested that on remand, we might wish to consider this possibility and if we find that such "spillover" exists, formulate the appropriate remedy.

The issue presented to us appears to be one of first impression as we are unaware of any military decision touching
upon "tainted evidence" derived from an improper joint representation of two parties involved in the same offense. However, there does appear to be an analogy between the situation at bar and the Government's ability to establish that it made no improper use of an accused's immunized testimony. See United States v. Lucas, 25 M.J. 9 (C.M.A. 1987). The burden in this regard lies with the Government

to show that it "had an independent, legitimate source for the disputed evidence." United States v. Gardner, 18 M.J. 612 (A.F.C.M.R 1984); aff'd 22 M.J. 28 (C.M.A. 1986). This, of course, is a factual determination to be gleaned from the record of trial and the allied papers. United States v. Gardner, 22 M.J. 28 (C.M.A. 1986). If this can be done there is no bar to the Government using the evidence.

The evidence as to the remaining offenses is based on the testimony of Senior Airman Donna Ryan who began assisting the Office of Special Investigations (OSI) as an informant in June 1981. Ryan testified that during a softball game on 17 June 1981, the appellant suggested that she (Ryan) was "bisexual" and that the two of them might wish to go to a homosexual bar that the appellant knew. Later, the appellant put her arms around Ryan's neck, kissed her and said she loved her. Shortly thereafter Ryan reported the incident to the OSI and gave them a statement regarding it. Ryan also stated at trial that on 10 July 1981, she saw the appellant in possession of marijuana and what the appellant said was amphetamine. She also saw her use marijuana. The marijuana cigarette and supposed amphetamine tablets the appellant gave her were released to the OSI who forwarded the items to the Army testing laboratory at Ft. Gordon, Georgia for analysis. The laboratory report which was returned on 17 August indicated the cigarette contained marijuana, but the tablets did not contain a controlled substance.

The trial transcript and the investigatory file clearly establish that the Government had an "independent, legitimate source" i.e., Ryan, for the evidence used to convict the appellant of the remaining offenses. The evidence was developed and known to the Government long before either Captain Powers or Captain Smith, the attorneys whose joint representation of the appellant and Peelman denied the appellant the effective assistance of counsel, became

involved in the case. The investigatory file in the allied papers indicate that the appellant's criminal activities came to light as the result of Ryan's connection with the OSI and not the other way around. The exact date of Powers' appointment as counsel to both the appellant and Peelman is not known, but he stated it was "In the summer of 1981." Captain Smith, however, identifies 8 September as the first time he met the appellant and Peelman and entered into an attorney-client relationship with them.

On the facts just reviewed we see no basis to find that the evidence relating to the dismissed guilty findings "directly tainted" the remaining charges. The Government was aware of the appellant's misconduct as to the remaining offenses before either Powers or Smith entered the case. We find no evidence of a "spillover" of tainted evidence from the dismissed allegations to those remaining. Accord United States v. Lucas, supra.

We now address the sufficiency of the evidence on the remaining offenses. Ryan stated that the appellant implied that she (Ryan) was sexually oriented toward both sexes and suggested that both of them go to a homosexual bar. Later, the appellant kissed her and said "she loved (her)." Approximately three weeks after the incident described above, Ryan saw the appellant use and possess marijuana and attempt to possess amphetamine.

Ryan's testimony, if believed by the military judge who was sitting as the fact finder, supports a conviction for conduct unbecoming an officer. Because of the special status afforded officers, they are held to a higher standard of conduct. United States v. Tedder, 24 M.J. 176 (C.M.A. 1987). Clearly, the appellant's conduct compromised her status as an officer and mortally wounded the confidence and respect that others have for authority of the officer

corps. See United States v. Van Steenwyk, 21 M.J. 795 (N.M.C.M.R. 1985).

Additionally, Ryan stated she was familiar with the odor and appearance of marijuana and the substance she saw the appellant possess and use was marijuana. Her testimony was bolstered by the physical evidence, i.e., marijuana cigarette and the two supposed amphetamine tablets. This evidence, if believed, is sufficient to establish the gravamen of the offense.

In summary, the appellant's conviction of the remaining offense turns on the credibility of the witnesses. In reviewing the sufficiency of the evidence to sustain a conviction we are not free to overturn a lower court's finding of guilty if there is "some legal and competent evidence from which a court-martial may find or infer beyond a reasonable doubt those facts required by law for conviction." United States v. Odegard, Dkt. No. 54177, ___ M.J. ___ (C.M.A. Sept 30, 1987) and cases cited therein; Article 66(c), U.C.M.J.

We have examined the record of trial and like the trial court, we are convinced beyond a reasonable doubt that the appellant is guilty of the offenses alleged.

Except for those offenses we earlier dismissed, those remaining are affirmed. The sentence is set aside. A rehearing on sentence may be ordered.

Senior Judge FORAY and Judge HOLTE concur.

OFFICIAL:
PAMELA HOWARD
Captain, USAF
Chief Commissioner

FOOTNOTE:

[1] Peelman's testimony was the basis of the sodomy allegations [Specifications of the Additional Charge] and the drug offenses involving marijuana and amphetamine [Specification 3 of Charge III and the Specification of Charge II].

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS LOWRY TECHNICAL TRAINING CENTER (ATC)
LOWRY AIR FORCE BASE, COLORADO 80230-5000

General Court-Martial Order
No. 100
1 December 1987

In the general court-martial case of SECOND LIEUTENANT JOANN C. NEWAK, 167-38-0452FV, United States Air Force, 21st Air Division, the findings of guilty as to the Specifications of the Additional Charge, Specification 3 of Charge III and the Specification of Charge II and the sentence as promulgated in General Court-Martial Order No. 9, Headquarters Twelfth Air Force (TAC), dated 10 June 1982, were set aside. A rehearing on the findings and sentence is ordered before another court-martial to be hereafter designated. The sentence was adjudged on 11 March 1982. (ACM 23544 (f rev)).

FOR THE COMMANDER

/s/JANE S. LOVE, Capt, USAF
Assistant Staff Judge Advocate

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS LOWRY TECHNICAL TRAINING CENTER (ATC)
LOWRY AIR FORCE BASE, COLORADO 80230-5000

General
Court-Martial Order No. 150
14 January 1988

General Court-Martial Order No. 100, this Headquarters, dated 1 December 1987, is revoked.

FOR THE COMMANDER

/s/JANE S. LOVE, Capt, USAF
Assistant Staff Judge Advocate

DEPARTMENT OF AIR FORCE
HEADQUARTERS TWELFTH AIR FORCE (TAC)
Bergstrom Air Force Base,
Texas 78743-5002

General Court-Martial Order
No. 23
15 Jan 1988

In the general court-martial case of SECOND LIEUTENANT JOANN C. NEWAK, 167-38-0452FV, United States Air Force, 2lst Air Division, the findings of guilty as to Charge II and its specification, Specification 3 of Charge III, and the Additional Charge and its specifications as promulgated in General Court-Martial Order 9, Headquarters Twelfth Air Force (TAC), dated 10 June 1982, were set aside and dismissed. The remaining findings of guilty were affirmed. The sentence was set aside. A rehearing on sentence only is ordered before another court-martial to be hereafter designated. The sentence was adjudged on 11 March 1982. (ACM 23544 (f rev)).

FOR THE COMMANDER

DONALD A.NOLTE, Lt Colonel, USAF
Assistant Staff Judge Advocate

DEPARTMENT OF AIR FORCE
HEADQUARTERS TWELFTH AIR FORCE (TAC)
Bergstrom Air Force Base,
Texas 78743-5002

Special Order
AB-33
27 Jan 1988

A general court-martial is hereby convened. The case of United States v. Joann C. Newak is referred to this court-martial for a rehearing on sentence only. It shall meet at Berstrom Air Force Base, Texas, unless otherwise directed. The court shall be constituted as follows:

MEMBERS

[Names of members omitted]

/s/MERRILL A. MCPEAK
Lieutenant General, USAF
Commander

DEPARTMENT OF AIR FORCE
HEADQUARTERS TWELFTH AIR FORCE (TAC)
Bergstrom Air Force Base, Texas 78743

General
Court-Martial Order No. 87
28 July 1988

Before a general court-martial which convened at Bergstrom Air Force Base, Texas, pursuant to Special Order AB-33, this headquarters, dated 27 January 1988, a rehearing on sentence only was held on SECOND LIEUTENANT JOANN C. NEWAK, 167-38-0452FV, United States Air Force, 67th Combat Support Group, formerly assigned to 2lst Air Division, Hancock Field, New York, the former proceedings having been published in General Court-Martial Order No. 9, this headquarters, dated 10 June 1982. The United States Court of Military Appeals set aside and dismissed the findings of guilty as to Charge II and its specification, specification 3 of Charge !II, and the Additional Charge and its specification and the sentence. The case was remanded to the Air Force Court of Military Review for review of the remaining charges and specifications. The remaining findings of guilty were affirmed and the sentence was set aside and a rehearing on the sentence authorized by the Air Force Court of Military Review (ACM 23544 (f rev)). A rehearing on the sentence was ordered as promulgated by General Court-Martial Order No. 23, this headquarters, dated 15 January 1988. The affirmed findings of the former proceedings are as follows:

CHARGE I: ARTICLE 81
Plea: NG
Finding: G

Specification 3 (renumbered as Specification): Attempt to wrongfully transfer a substance she believed to be

amphetamines on 10 July 1981.
Plea: NG
Finding: G

CHARGE III (renumbered as CHARGE II):
ARTICLE 134
Plea: NG
Finding: G

Specification 1: Wrongfully use marijuana from 15 December 1980 to 1 September 1981.
Plea NG
Finding: G

Specification 2: Wrongfully possess marijuana from 15 December 1980 to 1 September 1981.
Plea: NG
Finding: G

CHARGE IV (renumbered as CHARGE III):
ARTICLE 133
Plea: NG
Finding:G

Specification: Engage in behavior unbecoming an officer on 17 June 1981.
Plea: NG
Finding: G

SENTENCE

Sentence adjudged, upon a rehearing, on 3 May 1988: Dismissal, confinement for 14 months and forfeiture of all pay and allowances.

ACTION

In the case of SECOND LIEUTENANT JOANN C. NEWAK, 167-38-0452FV, United States Air Force, 67th Combat Support Group, the sentence is approved and, except for the part of the sentence extending to dismissal, will be executed. The term of confinement having been served, no place of confinement is designated.

/s/Peter T. Kempf

Lieutenant General, USAF
Commander

FOR THE COMMANDER
/s/DONALD A.NOLTE
Lt Col, USAF
Assistant Staff Judge Advocate

UNITED STATES AIR FORCE
COURT OF MILITARY REVIEW

UNITED STATES

v.

Second Lieutenant JOANN C. NEWAK,
167-38-0452 FV
UNITED STATES AIR FORCE

ACM 23544 (reh)

06 JAN 1989

Sentence adjudged 3 May 1988 by GCM convened at Bergstrom Air Force Rase, Texas. Military Judge: Charles W. Fowler (sitting alone).

Approved Sentence: Dismissal, confinement for fourteen (14) months and forfeiture of all pay and allowances.

Appellate Counsel for the Appellant: Faith A. Seidenberg, Syracuse, New York 13202; Colonel Richard F. O'Hair and Major Lynne H. Wetzell.
Appellate Counsel for the United States: Colonel Joe R. Lamport, Lieutenant Colonel Robert E. Giovagnoni and

Captain Morris D. Davis.

Before

HODGSON, FORAY and HOLTE
Appellate Military Judges
DECISION UPON REHEARING

PER CURIAM:

This record of trial is before us for the third time. In our initial review we affirmed the appellant's conviction of drug abuse, sodomy with an enlisted woman and conduct unbecoming an officer with a second enlisted woman. United States v. Newak, 15 M.J. 541 (A.F.C.M.R. 1982).

On 13 July 1987, the Court of Military Appeals concluded the appellant was denied effective assistance of counsel and due process of law when her appointed military counsel represented both her and an enlisted woman, Airman Lynne Peelman, with whom she allegedly had sexual relations and who later became the chief prosecution witness against her on a number of charges. The court held that Peelman's testimony and any evidence or information derived from it was tainted and should not have been admitted at trial. Therefore, it set aside those allegations in which Peelman's testimony was the only evidence of the appellant's guilt or such strong evidence that the prejudicial effect was apparent. Her testimony was the basis of the sodomy allegations and the drug offenses involving marijuana and amphetamine. On remand the record of trial was returned to us for consideration of whether the allegations not based on Peelman's testimony were tainted by the actions of defense counsel. United States v. Newak, 24 M.J. 238 (C.M.A. 1987).

Although the Court of Military Appeals set aside the affected charges, the government was given leave to pursue them again if alternative untainted evidence was available.

We concluded that such was not the case, and dismissed the sodomy and drug allegations that were based on Peelman's testimony. At the Court of Military Appeals' direction we also considered the possibility that some "spillover" might have occurred from the tainted offenses involving Peelman on to those where she was not implicated. In our decision of 16 October 1987, we discussed, in some detail, the rationale for our conclusion why there was no "spillover." Accordingly, we affirmed the remaining offenses and ordered a rehearing on the sentence. United States v. Newak, 25 M.J. 564 (A.F.C.M.R. 1987). This was accomplished on 3 May 1988, with the appellant sentenced to a dismissal, total forfeitures, and confinement for 14 months.

In her current brief the appellant assigns the following errors:

ISSUE I

WHERE THE DEFENSE COUNSEL'S CONFLICT OF INTEREST RESULTED IN INEFFECTIVE ASSISTANCE OF COUNSEL, THE ENTIRE ADVERSARIAL PROCESS WAS FUNDAMENTALLY UNFAIR AND ALL CHARGES OF THE COURT-MARTIAL SHOULD BE DISMISSED.

ISSUE II

THIS COURT WAS OBLIGATED TO HOLD AN EVIDENTIARY HEARING TO DETERMINE
WHETHER THERE WAS ANY TAINT OR "SPILLOVER" ON THE OTHER CHARGES.

ISSUE III

THE PROPER STANDARD OF REVIEW WAS NOT FOLLOWED BY THE COURT IN ITS REVIEW OF APPELLANT'S CASE.

ISSUE IV

THE GOVERNMENT DID NOT MEET ITS BURDEN OF PROOF.

While none of the above assertions justify setting aside the appellant's conviction, a discussion of each is warranted.

I

The appellant's initial claim is that the Court of Military Appeals' holding that she was denied effective assistance of counsel during the investigatory stages of the proceedings mandates that all charges be dismissed, including those which did not involve Peelman's testimony, and that the "remedy ordered by [that court] was not sufficient to correct the prejudice suffered by [her]."

The thrust of the appellant's present argument was generally incorporated in a brief submitted to the Court of Military Appeals in August 1983. The remand of the appellant's record by that court to us to consider if there was a "spillover" from the allegations involving Peelman and the remaining specifications is an express rejection by them of that claim of error. Had the Court of Military Appeals concluded that all charges were tainted they would have dismissed them rather than direct a lower court to test the proceedings for prejudice. In our opinion the Court of Military Appeals has already considered the assigned issue and resolved it against the appellant. We see no need to address it further.

II

Next the appellant argues that the remand of her case to this court "for consideration of the issue of whether the remaining findings of guilt were tainted by the actions of the defense counsel" required us to hold an evidentiary hearing to determine if there was any "spillover" from the tainted charges to those remaining.

The military practice of holding post-trial evidentiary hearings has its genesis in United States v. DuBay, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967), in which the Court of Military Appeals remanded the case for a limited hearing on the issue of unlawful command influence. The procedure is broad enough to include inquiries in virtually every aspect of a trial. Typically, a hearing is ordered to fully develop a factual basis for an issue raised on appeal. See R.C.M. 1102. The issue before us could properly be the subject of a evidentiary hearing, however, it is within the discretion of an appellate court to decide if such a hearing is required. United States v. Hedrington, 47 C.M.R. 984 (A.F.C.M.R. 1973); see also United States v. Murphy, 621 Fed. Sup. 560 (D.C. N.Y. 1985). We conclude that the Court of Military Appeals wished us to exercise that discretion in resolving the remanded issue, otherwise they would have directed an evidentiary hearing themselves as they have done in dozens of cases since the DuBay holding. See generally United States v. Reece, 25 M.J. 73 (C.M.A. 1986).

If the contested factual issue can be resolved from the record itself, an evidentiary hearing is not required. Bryan v. United States, 721 F.2d 572 (6th Cir. 1983). Appellate counsel argue that our "cursory examination of the record" does not address the issue adequately, and "[O]nly an actual hearing, with examination of Captains Smith, Powers and Torres, including a review of their files and notes, together with a full examination of Amn Ryan and her contacts with O.S.I., and examination of Amn Peelman and Liles will reveal whether the remaining charges are supported by legitimate, independent evidence which is untainted, and whether any use was made of the improper evidence to secure the evidence used against [the appellant] on the other charges."

To place this assertion of error in the proper perspective it should be remembered that the attorney who represents the appellant on this appeal also represented her at trial. The record discloses that Captain Smith, Torres and

Powers all testified either as a defense or prosecution witness on the appellant's trial motion to dismiss because of inadequate pretrial representation. Airmen Peelman and Ryan both testified on the merits, and individual defense counsel had the opportunity to cross-examine them, which she did. Likewise, she had the opportunity to question Airman Liles at the pretrial investigation. The "full examination" of witnesses the appellant now claims is her due was afforded her almost seven years ago at the trial when the memories of the parties were fresh and their notes and files easily obtainable.

In our view, the appellant's trial record provides an adequate basis for us to conclude that the evidence relating to the remaining charges was not tainted by the dismissed specifications. Accordingly, an evidentiary hearing was not required in this case.

III

Finally, the appellant argues that the government did not discharge its "heavy burden" to establish that the evidence supporting the charges not involving Peelman came "from a legitimate source wholly independent" from the tainted evidence, and thus we did not apply the proper standard of review in her case.

Appellate counsel acknowledge that Peelman gave no evidence on the remanded charges, but suggest that Captain Smith's (appellant's appointed military counsel) access to confidential information obtained from both Peelman and the appellant might have influenced his decisions during the pretrial investigations on both sets of allegations. The appellant again urges her earlier position that where ineffective assistance of counsel has been established, all the charges should be considered tainted, and the remanded charges be dismissed.

As the Court of Military Appeals pointed out in its 13 July 1987 decision, Captain Smith played an important role

in producing the testimony of Peelman, and it was for that reason that he compromised his position as an advocate for the appellant. Smith had no such relationship with Airman Ryan, whose testimony was the basis for the conviction of the remanded charges. As we indicated in our 16 October 1987 decision, Ryan began helping law enforcement officers in June 1981, approximately three months before Smith entered into an attorney-client relationship with both Peelman and the appellant. Smith's relationship with both parties had no nexus with the offenses about which Ryan testified. We affirm our earlier position that no "spillover" occurred from the tainted offenses to those submitted to us on remand. The findings of guilty and the sentence are again

AFFIRMED.

OFFICAL:
/s/MARYV. FILLMAN
Captain, USAF
Chief Commissioner

UNITED STATES COURT OF MILITARY APPEALS

UNITED STATES,
Appellee

v.

Joann C. NEWAK (167-38-0452),
Appellant

USCMA Dkt. No. 46098/AF

CMR Dkt. No. 23544

ORDER

On further consideration of the petition for grant of review of the decision of the United States Air Force Court of Military Review, it is by the Court this 8th day of September, 1989

ORDERED:

That said petition is hereby granted on the issues raised by appellate defense counsel; and

That the decision of the United States Air Force Court of Military Review is affirmed.

For the Court,

/s/JohnA. Cutts, III
Deputy Clerk of the Court

cc: The Judge Advocate General
of the Air Force
Appellate Defense Counsel (SEIDENBERG, Esq.)
Appellate Government Counsel
(GIOVAGNONI)

Supreme Court, U.S.
FILED
JAN 5 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-757

In the Supreme Court of the United States

OCTOBER TERM, 1989

JOANNE C. NEWAK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

JOE R. LAMPORT
Col., OJAG, USAF

ROBERT E. GIOVAGNONI
Col., OJAG, USAF

MORRIS D. DAVIS
Capt., OJAG, USAF
Appellate Government Counsel
Government Trial and Appellate Division
Headquarters, United States Air Force
Bolling Air Force Base
Washington, D.C. 20332-6128

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether petitioner is entitled to dismissal of the charges against her because an attorney who represented her before trial suffered from a conflict of interest, even though petitioner was represented at trial by a different attorney and petitioner suffered no prejudice from the pretrial representation by her first attorney.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	12

TABLE OF AUTHORITIES

Cases:

Chapman v. *California*, 386 U.S. 18 (1967)	7
Coleman v. *Alabama*, 399 U.S. 1 (1970)	8
Cuyler v. *Sullivan*, 446 U.S. 335 (1980)	7
Gilbert v. *California*, 388 U.S. 263 (1967)	8, 10
Glasser v. *United States*, 315 U.S. 60 (1942)	7
Hamilton v. *Alabama*, 368 U.S. 52 (1961)	8
Hoffa v. *United States*, 385 U.S. 293 (1966)	8
Holloway v. *Arkansas*, 435 U.S. 475 (1978)	7
Kastigar v. *United States*, 406 U.S. 441 (1972)	10
Massiah v. *United States*, 377 U.S. 201 (1964)	10
Milton v. *Wainwright*, 407 U.S. 371 (1972)	8
Moore v. *Illinois*, 434 U.S. 220 (1977)	8
Moran v. *Burbine*, 475 U.S. 412 (1986)	9
Murphy v. *Waterfront Comm'n*, 378 U.S. 52 (1964)	6
Rushen v. *Spain*, 464 U.S. 114 (1983)	8
United States v. *Gardner*, 18 M.J. 612 (A.F.C.M.R. 1984), aff'd, 22 M.J. 28 (C.M.A. 1986)	6, 11
United States v. *Gouveia*, 467 U.S. 180 (1984)	9
United States v. *Lucas*, 25 M.J. 9 (C.M.A. 1987), cert. denied, 484 U.S. 1027 (1988)	11
United States v. *Morrison*, 449 U.S. 361 (1981)	9, 10

Cases—Continued: Page

United States v. *Wade*, 388 U.S. 218 (1967) 8, 10
United States v. *Wattenbarger*, 21 M.J. 41 (C.M.A. 1985), cert. denied, 477 U.S. 904 (1986) 9
Weatherford v. *Bursey*, 429 U.S. 545 (1977) 8, 11
White v. *Maryland*, 373 U.S. 59 (1963) 8

Constitution and statutes:

U.S. Const. Amend. VI 7, 8, 9, 10
Uniform Code of Military Justice, 10 U.S.C. 801 *et seq.*:
Art. 32, 10 U.S.C. 832 ..... 7, 8
Art. 66(c), 10 U.S.C. 866(c) 6
Art. 67, 10 U.S.C. 867 6
Art. 80, 10 U.S.C. 880 2
Art. 92, 10 U.S.C. 892 2
Art. 125, 10 U.S.C. 925 2
Art. 133, 10 U.S.C. 933 2
Art. 134, 10 U.S.C. 934 2

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-757

JOANNE C. NEWAK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The initial opinion of the Air Force Court of Military Review (Pet. App. 109-115) is reported at 15 M.J. 541. The opinion of the Court of Military Appeals reversing in part the judgment of the court of military review and remanding the case to that court (Pet. App. 117-132) is reported at 24 M.J. 238. The opinions of the court of military review on remand (Pet. App. 135-141) and on appeal after resentencing (Pet. App. 149-155) are unreported. The opinion of the Court of Military Appeals affirming the final judgment of the court of military review (Pet. App. 156-157) is not yet officially reported.

JURISDICTION

The judgment of the Court of Military Appeals was entered on September 8, 1989. The petition for a writ of

certiorari was filed on November 7, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(1) (Supp. V 1987).

STATEMENT

Following a general court-martial at Hancock Field in New York, petitioner, an officer in the United States Air Force, was convicted of using and transferring a substance that she believed to be amphetamine, in violation of Article 80 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 880; possession of amphetamine, in violation of Article 92, UCMJ, 10 U.S.C. 892; possession, use, and transfer of marijuana, in violation of Article 134, UCMJ, 10 U.S.C. 934; conduct unbecoming an officer by making homosexual comments and advances toward a female enlisted member, in violation of Article 133, UCMJ, 10 U.S.C. 933; and sodomy with a second female enlisted member, in violation of Article 125, UCMJ, 10 U.S.C. 925. The court-martial sentenced petitioner to confinement for seven years, dismissal from the service, and forfeiture of all pay and allowances. The convening authority modified the findings and reduced petitioner's confinement to six years. The Court of Military Appeals set aside some of the findings of guilt and remanded the case for further proceedings. A rehearing on sentence was held on the remaining offenses, and petitioner was sentenced to 14 months' confinement, dismissal from the service, and forfeiture of all pay and allowances. On further review, the court of military review and the Court of Military Appeals both affirmed.

1. In May or June 1981, Airman Donna Ryan went to the Air Force Office of Special Investigations (OSI). Ryan was a member of the security police squadron and had previously received administrative punishment for driving

while intoxicated (DWI). Believing that she was innocent of the DWI offense, Ryan went to the OSI for assistance. Tr. 71. While at the OSI office, Ryan was asked if she would assist the OSI in an undercover capacity. Ryan decided to do so in order to prove that, despite the DWI incident, she was still "a good cop." Tr. 72.

On June 17, Ryan, along with petitioner and several other female military members, attended a softball game. While sitting in the bleachers, Ryan discussed her DWI incident with petitioner. Petitioner told Ryan that the reason she had been punished for DWI was because she was bisexual, which Ryan denied. Later, petitioner invited Ryan to go with her to a bar, and Ryan accepted. Tr. 72. Petitioner subsequently put her arm around Ryan, kissed her on the neck, and said that she loved her. Ryan pulled away from petitioner. Tr. 73.

On July 6, Ryan saw petitioner at another softball game. Along with Airman John Liles, they agreed to meet later at Ryan's dormitory room. Petitioner drove Ryan and Liles to several bars in the local area. While sitting in her car outside one bar, petitioner reached into a compartment between the seats and pulled out some speckled pills. Petitioner told Ryan and Liles that the pills were "speed" and passed them out. Tr. 73, 74. Petitioner and Liles each ingested one and a half pills; Ryan placed her pill into her pocket and later gave it to the OSI. Tr. 74. The pill was tested and found to contain caffeine. Tr. 104-105; PX 1.

On July 9, Ryan and petitioner again met at the softball field while petitioner was umpiring a game, and they later went for a ride in petitioner's car. Petitioner told Ryan that Airman Lynne Peelman had come to her house one evening after breaking up with her boyfriend. According to petitioner, while she and Peelman were in the basement petitioner kissed Peelman, Peelman responded, and they ultimately engaged in intimate physical contact. Tr. 75-76.

On July 10, petitioner invited Ryan to her house for dinner, where they were ultimately joined by Airman Liles. During a tour of her home, petitioner removed a zip-lock bag from beneath a dresser in her bedroom. Ryan estimated that the bag contained about an ounce of marijuana. Petitioner also pulled out a film canister containing the same type of pills that she had previously given Ryan and Liles. Petitioner gave Ryan and Liles two of the pills each. Liles ingested his pills, but Ryan placed hers in her pocket. Tr. 76-77. The pills were later tested and found to contain caffeine. Tr. 104-105; PX 1. Later that evening, petitioner and Peelman rolled and smoked four or five marijuana cigarettes. Ryan simulated smoking the cigarettes, as she had been taught to do by the OSI. Ryan retrieved three cigarette remnants, which were tested and found to contain marijuana. Tr. 77-78, 104-105; PX 1.

2. During the summer of 1981, petitioner and Peelman were notified that they were under investigation, and Captain John Powers, the base defense counsel, was informally assigned to them. Captain Powers saw petitioner and Peelman separately and formed an attorney-client relationship with each of them. Late in August or early in September, Captain Powers learned that he was to be transferred; he subsequently introduced his replacement, Captain Raymond Smith, to petitioner and Peelman. Captain Smith then entered into an attorney-client relationship with petitioner and Peelman. Pet. App. 119.

The investigation ultimately focused on petitioner. On about October 20, the base staff judge advocate met with Captain Smith informally to discuss the possibility of granting Peelman use immunity. The base staff judge advocate told Captain Smith that he would recommend to the convening authority that Peelman be given use immunity, and he advised Smith to encourage Peelman to cooperate. Smith and Powers discussed the matter and contacted their super-

visor, who decided that Smith should sever his attorney-client relationship with petitioner. Pet. App. 120-121. Smith withdrew as petitioner's counsel and a new attorney was assigned to petitioner on October 23, *id.* at 121, the same day that petitioner was formally charged with all of the narcotics offenses as well as the charge of conduct unbecoming an officer. Tr. 7-7.1. Peelman was formally granted use immunity a month later, on November 17. Pet. App. 120-121. Based on information provided by Peelman, petitioner was charged with sodomy on December 31, 1981. Tr. 8-8.1.

Captain Smith thereafter represented Peelman, who testified against petitioner at trial. During the course of his representation, Smith may have relied on information that he learned from petitioner in formulating his advice for Peelman. Pet. App. 121-122.

3. On appeal, petitioner argued that Captain Smith labored under a conflict of interest because before trial he represented both petitioner and Peelman, who later became a prosecution witness. The court of military review rejected petitioner's argument, on the ground that she was assigned a different attorney before any charges were filed. Pet. App. 111-113. The Court of Military Appeals, however, agreed with petitioner and held that Captain Smith's joint pretrial representation of petitioner and Peelman was improper. The court reasoned that, due to his discussions with the base staff judge advocate regarding immunity for Peelman and his subsequent representation of Peelman, "Captain Smith played an important role in producing the testimony of Airman Peelman" against petitioner at her trial. *Id.* at 128. Accordingly, the court vacated the findings of guilt "in which Peelman's testimony constituted either the only evidence of [petitioner's] guilt or such strong evidence that we are unable to conclude that [petitioner] was not prejudiced from Peelman's testimony thereon." *Id.* at 132 n.6. The court

remanded the case to the court of military review for it to determine whether the remaining findings of guilt were also tainted. *Id.* at 129.[1]

On remand, the court of military review found that the remaining findings of guilt were not tainted. The court held that the remaining convictions could stand if the government could prove "that it ' "had an independent, legitimate source for the disputed evidence." ' " Pet. App. 138 (quoting *United States* v. *Gardner*, 18 M.J. 612, 615 (A.F.C.M.R. 1984), aff'd, 22 M.J. 28 (C.M.A. 1986), quoting in turn *Murphy* v. *Waterfront Comm'n*, 378 U.S. 52, 79 n.18 (1964)). After examining the record, the court determined that the government had carried its burden. Pet. App. 138-139. It found that the proof of petitioner's remaining convictions—violating a military regulation by transferring a substance that petitioner believed was amphetamine; possessing and using marijuana; and engaging in conduct unbecoming an officer by making homosexual remarks to and advances toward a female enlisted member—was based entirely on the testimony of Airman Ryan and the physical evidence that Ryan obtained. *Id.* at 138. Since that "evidence was developed and known to the Government long before either Captain Powers or Captain Smith * * * became involved in the case," *id.* at 138-139, the improper joint representation did not have any "spillover" effect on the remaining convictions, *id.* at 139. Because some of petitioner's convictions had been reversed, however, the court ordered a rehearing as to her sentence. *Id.* at 140. See *id.* at 141-148.

Following the rehearing on sentence, the court of military review, Pet. App. 149-155, and the Court of Military Appeals, *id.* at 156, both affirmed the findings and sentence.

---

[1] The courts of military review have independent fact-finding authority under Article 66(c) of the UCMJ, 10 U.S.C. 866(c), which the Court of Military Appeals does not have under Article 67, 10 U.S.C. 867.

ARGUMENT

Petitioner contends that she is entitled to dismissal of the charges against her because Captain Smith improperly represented both petitioner and Peelman for a brief period during the pretrial stage of the case. Relying on *Cuyler* v. *Sullivan*, 446 U.S. 335 (1980), *Holloway* v. *Arkansas*, 435 U.S. 475 (1978), and *Glasser* v. *United States*, 315 U.S. 60 (1942), petitioner contends that the military appellate courts erred in undertaking to determine whether she was prejudiced by that conflict of interest. In her view, this Court's decisions hold that once a defendant has shown that her counsel suffered from a conflict of interest, the court may not inquire whether a defendant was prejudiced. Accordingly, petitioner submits, the only remedy is to dismiss the charges against her. The courts below, however, correctly rejected petitioner's claim, and the unusual facts of this case do not warrant review by this Court.

Cuyler, *Holloway*, and *Glasser* are not controlling here. In those cases, a lawyer jointly represented at trial defendants charged with identical criminal conduct whose interests conflicted. This Court held that in such cases the defendant is denied the assistance of counsel in violation of the Sixth Amendment and is entitled to a new trial at which he is represented by a lawyer who does not suffer from divided loyalties. Cf. *Chapman* v. *California*, 386 U.S. 18, 23 & n.8 (1967) (forcing a defendant to stand trial without counsel requires reversal in every case). In this case, however, Captain Smith did not represent petitioner at trial. Captain Smith withdrew as petitioner's counsel once charges were filed against her, Pet. App. 121, and he did not thereafter represent petitioner at any hearing in the case. In fact, the record shows that petitioner has been continuously represented by her current lawyer from the pretrial Article 32

hearing[2] to date. Accordingly, *Cuyler*, *Holloway*, and *Glasser* do not govern this case.

The inquiry undertaken by the military appellate court into the question whether petitioner was prejudiced is consistent with well settled authority in this Court. For instance, this Court has long held that the government's failure to provide a defendant with counsel at a pretrial stage of a criminal case can be harmless error in an appropriate case. *Rushen* v. *Spain*, 464 U.S. 114, 117-118 n.2 (1983); *Moore* v. *Illinois*, 434 U.S. 220, 232 (1977); *Coleman* v. *Alabama*, 399 U.S. 1, 10-11 (1970). See also *Milton* v. *Wainwright*, 407 U.S. 371 (1972); *Gilbert* v. *California*, 388 U.S. 263, 272, 274 (1967); *United States* v. *Wade*, 388 U.S. 218, 242 (1967). Compare *White* v. *Maryland*, 373 U.S. 59, 60 (1963) (reversal required in a capital case where defendant's unaccepted guilty plea entered at arraignment in the absence of counsel was later introduced against him at trial); *Hamilton* v. *Alabama*, 368 U.S. 52, 54-55 (1961) (reversal required in a capital case where the defendant forfeited the right to enter an insanity plea at arraignment, where he lacked counsel). Moreover, the Court has held that the Sixth Amendment is not violated if a government informant meets with a defendant and his counsel before trial, as long as the government does not make use of privileged information in preparing and presenting its case at trial. *Weatherford* v. *Bursey*, 429 U.S. 545, 551-559 (1977). Cf. *Hoffa* v. *United States*, 385 U.S. 293, 308-309 (1966). The military appellate courts were therefore correct in ruling that not every Sixth Amendment violation requires a judgment of

---

[2] Article 32 of the UCMJ, 10 U.S.C. 832, requires an impartial officer to investigate the factual basis for a charge before it may be referred to a general court-martial. An Article 32 hearing is similar to the type of preliminary hearing that is held in the civilian courts to determine whether there is probable cause to believe that the accused has committed a crime.

conviction to be set aside, much less dismissal of the charges against the accused.[3]

This Court's decision in *United States* v. *Morrison*, 449 U.S. 361 (1981), is instructive on the correct inquiry in a case like this one. In that case, after the defendant was indicted and had retained counsel, federal narcotics agents conversed with the defendant in the absence of her attorney and sought to persuade her to retain a new lawyer. The Court held that the agents' conduct, although improper, did not require a dismissal of the indictment, because the defendant was not prejudiced by the agents' conduct. The Court reasoned that "[c]ases involving Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not necessarily infringe on competing interests." 449 U.S. at 364. After canvassing its earlier Sixth Amendment decisions, the Court noted that "when before trial but after the institution of adversary proceedings, the prosecution has improperly obtained incriminating information from the defendant in the absence of his counsel, the remedy characteristically imposed is not to dismiss the indictment but to suppress the evidence or to order a new trial if the evidence has been wrongfully ad-

---

[3] It is not clear that petitioner can even assert a claim under the Sixth Amendment, since she had not been charged with a crime at the time that Captain Smith discussed the subject of use immunity for Peelman with the base staff judge advocate. See *Moran* v. *Burbine*, 475 U.S. 412, 428-431 (1986), and *United States* v. *Gouveia*, 467 U.S. 180, 187 (1984) (a defendant's Sixth Amendment right to counsel attaches "only at or after the initiation of adversary judicial proceedings against" him); *United States* v. *Wattenbarger*, 21 M.J. 41, 43 (C.M.A. 1985), cert. denied, 477 U.S. 904 (1986) (in the military a defendant's right to counsel does not attach until the preferral of charges against him). Petitioner's claim is therefore more properly characterized as a due process claim, and under a due process analysis it is clear that automatic reversal is not required.

mitted and the defendant convicted." *Id.* at 365 (citing *Gilbert*, *supra*; *Wade*, *supra*; and *Massiah* v. *United States*, 377 U.S. 201 (1964)). As the Court summarized, "[o]ur approach has thus been to identify and then neutralize the taint by tailoring relief appropriate in the circumstances to assure the defendant the effective assistance of counsel and a fair trial." 449 U.S. at 365.

The military appellate courts correctly followed that approach in this case. The Court of Military Appeals found that Captain Smith's joint pretrial representation of petitioner and Peelman injured petitioner because he "played an important role in producing [Peelman's] testimony" against petitioner at trial. Pet. App. 128. Accordingly, the Court of Military Appeals vacated petitioner's convictions on all the charges that were based entirely on Peelman's testimony, or in which Peelman's testimony provided "strong evidence" of petitioner's guilt, Pet. App. 132 n.6, and the court of military review dismissed those charges on remand, *id.* at 137, 140. That action left standing only petitioner's convictions on the three charges originally filed against her before Peelman was granted use immunity. In order to determine whether petitioner was also entitled to relief on those charges, the Court of Military Appeals directed the court of military review on remand to determine whether Peelman's testimony had any "spillover" effect on those counts. In undertaking that inquiry, the court of military review required the government to prove that it had "an independent, legitimate source for the disputed evidence," *id.* at 138, which is the same burden that the government must carry under *Kastigar* v. *United States*, 406 U.S. 441, 460 (1972), to show that it has not made improper use of testimony given by a defendant under a grant of use immunity.[4] Given the nature of the Sixth Amendment

[4] Although the court of military review did not cite *Kastigar* in its opinion in this case, the court of military review clearly applied the

violation that the Court of Military Appeals found in this case, the *Kastigar* standard is an appropriate one to determine whether petitioner was denied the effective assistance of counsel or a fair trial. Cf. *Weatherford* v. *Bursey*, 429 U.S. at 550-559. In sum, the military appellate courts undertook precisely the inquiry contemplated by this Court's precedents and crafted a remedy that neutralized the adverse effect on petitioner from Captain Smith's conflict of interest.

The only remaining question is whether the government satisfied the *Kastigar* standard in this case. The court of military review twice found that the government carried its burden, since the offenses of which petitioner now stands convicted were all based upon information and physical evidence that Airman Ryan gave to the OSI in June and July 1981, well before Captain Smith became petitioner's lawyer. Pet. App. 138-139 (remand decision), 154-155 (decision on appeal following resentencing).[5] The Court of Military Appeals did not disturb those findings. Petitioner does not argue that the government's proof of the amphetamine, marijuana, and conduct-unbecoming-an-officer charges were based on Peelman's testimony. In fact, petitioner concedes that Ryan supplied the proof for those charges. Pet. 6. Under these circumstances, further review of petitioner's claims is not warranted.

Kastigar standard. The court quoted the correct standard, Pet. App. 138, it expressly drew "an analogy between the situation at bar and the Government's ability to establish that it made no improper use of an accused's immunized testimony," *id.* at 137, and it cited the decisions in *United States* v. *Lucas*, 25 M.J. 9 (C.M.A. 1987), cert. denied, 484 U.S. 1027 (1988), and *United States* v. *Gardner*, 18 M.J. at 615, which discussed *Kastigar*.

[5] The court of military review, exercising its independent fact-finding power, found that there was no spillover of tainted evidence from the dismissed allegations to those remaining. Pet. App. 139.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

JOE R. LAMPORT
Col., OJAG, USAF

ROBERT E. GIOVAGNONI
Col., OJAG, USAF

MORRIS D. DAVIS
Capt., OJAG, USAF
Appellate Government Counsel
Government Trial and
Appellate Division

JANUARY 1990

☆ U.S. GOVERNMENT PRINTING OFFICE: 1990—262-203/00694